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EU FUNDS TRANSFERS:
TRANSPARENCY, PERFORMANCE AND STABILITY

COMMUNICATION TO THE EUROPEAN PARLIAMENT,
THE COUNCIL OF THE EUROPEAN UNION,
THE EUROPEAN MONETARY INSTITUTE AND
THE ECONOMIC AND SOCIAL COMMITTEE

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on cross-border transfers

Draft
NOTICE ON THE APPLICATION OF THE EC COMPETITION RULES
TO CROSS-BORDER TRANSFER SYSTEMS

(presented by the Commission)

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Introduction

In its March 1992 working document[1], the Commission conservatively estimated the number of cross-border payments at 400 million each year and at half this figure, i.e. 200 million, those not exceeding ECU 2 500 in value. Based on more recent figures[2], the Commission has calculated that, alone, the volume of cross-border credit transfers by the end of this century will account for well over 350 million transactions per annum. However, cross-border credit transfers accounted in 1991 for 29.5% (i.e. 117.6 million) of the total volume of cross-border payments. These figures do not include payments by cheque and the growing number of card transactions. It may therefore be far from unrealistic to assume that, by the year 2000, the total volume of cross-border payments, excluding cash payments, will exceed the figure of 1.2 billion per annum. It is important to note that, whilst cross-border payments may represent a small percentage of the total volume of payments, the average value of a cross-border payment is significantly higher than the average value of a comparable domestic payment.

Increasing cross-border activity in the Internal Market highlights the importance of early action to ensure that, in the medium term, the transparency, performance and stability of cross-border payment systems equals that of the best domestic payment systems. This fundamental objective is also consistent with the path set out for transition to a single currency. Article 109j(4) of the Treaty establishing the European Community sets out 1 January 1999 as the latest date for the beginning of stage III of Economic and Monetary Union.

The Commission, and indeed all interested parties, will therefore need to focus on how best to ensure that cross-border payment systems are fit to meet the challenges of the internal market and economic and monetary union.

The present communication is intended as a follow-up to the Commission working document of 27 March 1992, which laid down a detailed programme of work in the area of payment systems, as well as to the Communication of 14 December 1993[3] from Mr Vanni d'Archirafi and Mrs Scrivener. It consists of three separate sections, presenting the Commission's policy in the area of cross-border payments:

I. The first section refers to the Communication of 14 December 1993 and addresses the plan of action set out therein;

II. The second section develops principles on competition applicable to cross-border credit transfer systems;

III. The third section deals with progress made on accompanying policies with a view to improving cross-border payment systems.

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(1) SEC(92)621 final of 27 March 1992: "Easier cross-border payments: breaking down the barriers".

(2) Figures for 1991 (Annual Report of the EC Banking Federation, 1992) indicate the volume of EC cross-border credit transfers at 117.6 million. A prudent estimate of the medium/long term volume of such transfers has been made on the basis of the average yearly increment over the period 1989-1991 (in excess of 15% per annum), as well as taking into account the increase in EC SWIFT messages over the period 1991-1993 (cat. 1, customer transactions). On the assumption that the reference rate of increment would hold unchanged, it can conservatively be estimated that in the medium/long term, i.e. over the next five years leading up to the year 2000, the volume of cross-border credit transfers will increase by approximately 100%, thus reaching a minimum 356 million credit transfers.

(3) SEC(93)1968: "Transparency and performance of remote cross-border payments".

I. Transparency and performance of remote cross-border payments (Follow-up to the Communication of 14 December 1993)

In 1990, the Commission adopted Recommendation 90/109/EEC[4] ("the 1990 Recommendation"), which set out principles, to be applied by institutions, on the transparency of banking conditions relating to cross-border financial transactions.

The implementation of the 1990 Recommendation was discussed in the Commission's two advisory groups, Payment Systems Technical Development Group (PSTDG) and Payment Systems Users Liaison Group (PSULG), whose members are drawn from banks, central banks, consumers, retailers and small businesses.

In the PSULG, the European Credit Sector Associations, consumers, retailers and SMEs discussed and agreed on "European Banking Industry Guidelines for **Customer Information** on Cross-border Remote Payments" ("Industry Guidelines") which were annexed to the Commission working document of March 1992. The industry Guidelines were to be implemented by 31 December 1992. In the 1992 Working Document the Commission clearly stated that it would monitor the implementation of the Industry Guidelines and, should the self-regulatory efforts by the banking industry not have lead to a satisfactory implementation, it would bring about the necessary legislation to provide a statutory framework for customers' rights (*para. 64*). The Commission additionally indicated that it would look to the banking sector to ensure that the practice of **"double charging"** (i.e. unauthorized deductions from the principal amount transferred) was ended by the 31 December 1992. If problems persisted, the Commission would examine whether other measures were needed to end such double charging (*para. 26*). As to **timing** of cross-border transactions, the Commission announced that it would be "looking to those operating systems to set demanding targets for themselves and to include these in the information they provide to customers". The Commission would review progress in early 1993 (*para. 28*).

To this end, the Commission carried out a study early in 1993, which revealed shortcomings in the information provided to customers as well as in the performance of cross-border credit transfers (high incidence of double charging, uneven quality in timing of execution).

On the basis of these results, and after wide consultation of all interested parties (commercial banks, central banks, consumers, SMEs and retail trade), the Commission adopted on 14 December 1993 a plan of action[5], on the following lines:

- a second and definitive study would be carried out in early 1994, to measure whether sufficient progress had been made;

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[4] OJ NO L67, 15.3.1990, p. 39.

[5] See footnote 3.

- sufficient progress would be measured against a set of predetermined criteria:

  - full information was to be provided in at least two thirds of bank branches surveyed;
  - for the purpose of the study, a maximum incidence of double charging of 10% would be tolerated;
  - progress on the times of execution would be assessed notably by reference to the results of the previous study.

- in the absence of sufficient progress, the Commission would introduce binding measures. To this end, a first draft of a proposal for a Directive was attached to the communication, to be discussed with government experts as well as all interested parties, in order for it to be amended in readiness for its adoption, should this prove to be necessary.

To implement the Commission's action plan, a new study was launched in the first half of 1994. The study indicated that, despite some measurable improvements, the banks did not meet the criteria set by the Commission. The results were the following:

- no written information was available in 50% of bank branches surveyed; in the majority of the remaining cases, the written information available was not in accordance with the Industry Guidelines;

- 36% of the transfers were subject to unauthorized deductions from the principal amount transferred ("double charging");

- the average time taken to carry out transfers did not improve in comparison to the 1993 study;

- the average total cost of making a cross-border credit transfer of an amount equivalent to ECU 100 was ECU 25.4 .

A. **Given this situation, the Commission considers that insufficient progress has been made and that a legally binding instrument is now timely and appropriate. Therefore, the Commission has proposed a directive[6] and authorized its transmission to the European Parliament and the Council.**

B. **In awaiting the entry into force of the proposed directive the Commission will call on the banking sector and the representatives of the consumers to enter into solemn voluntary commitments which anticipate the implementation of the provisions laid down in its proposed directive.**

C. **Finally, the Commission, in full co-operation with the Member States, will make every effort to ensure that efficient redress procedures are made available to users of payment systems.**

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[6] Proposal for a European Parliament and Council Directive on cross-border credit transfers.

II. Competition policy and cross-border credit transfers

In Annex C to the March 1992 working document[7], the Commission spelt out the general conditions for the acceptability of specific kinds of interbank agreements in the area of cross-border credit transfer systems. Those principles on competition were intended to provide general guidance for banks and other financial institutions intending to set up systems allowing for clearing, netting and/or settlement of cross-border transfer payments between them or linking existing networks with each other. Those principles covered the criteria applicable to agreements on membership in such systems; the technical, legal and operational aspects of the services rendered to the institutions' customers; and the sharing of the cost of a system between its participants.

In order to meet the request for further clarification as to the extent to which the EC Treaty rules on competition apply to the setting up and functioning of cross-border credit transfer systems, and taking stock of intervening developments which have lead to the creation of a number of new transfer payment mechanisms, the Commission has decided to review these principles and to update them.

The Commission has adopted a draft "Notice on the application of the EC Competition rules to cross-border credit transfer systems". This draft notice sets out the approach the Commission intends to take when assessing the compatibility of cross-border credit transfer systems with the competition rules of the EC Treaty. This draft notice will be published in the Official Journal. This will enable the Commission to take account of the reactions of interested parties when it adopts the notice, which will replace the "Principles on competition for credit transfer systems" contained in Annex C of the Commission working document of 27 March 1992.

III. Progress on accompanying measures aimed at improving cross-border payments

In the concluding section of its March 1992 working document, the Commission set out the follow-up which it considered necessary. The preceding sections of the present communication provide examples of that follow-up in the areas to which they relate. On other aspects, work is also under way or shortly to be undertaken. What follows is a brief description of work under way in some of the more important areas.

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[7] Annex C to SEC(92)621.

III.1 The role of payment systems in preparing for the transition to the ECU

The process of planning for the transition to a single currency should in Commission's view be increasingly integrated with the process of making impr to cross-border payment systems within the internal market.

If investments in updated systems can be made over the coming years in the lig... plans for the ECU, not only will the transition be made easier, but it will also be more rapid and less costly.

While respecting the competence of the EMI in this area, the Commission will play its part in helping to increase the awareness of the ECU dimension in its work on payment systems. As a first step, the Commission's proposal for a European Parliament and Council Directive on cross-border credit transfers places the status of the ECU on an equal footing with any currency of a Member State of the European Union.

The Commission is convinced that the rapid introduction of the ECU, according to Article 109 l, par. 4 of the Treaty, would be facilitated by making appropriate use of electronic media such as electronic credit transfers, cards and purses. These payment instruments could make a major contribution to a smooth and publicly acceptable changeover to the ECU, provided that their role is properly taken into account at an early stage in the planning process.

Without prejudice to the initiative launched by the Commission with the communication on "Practical problems involved in introducing the ECU as the European Union's single currency[8]", the Commission intends to seek advice from its two consultative groups on payment systems, the Payment Systems Technical Development Group and the Payment Systems Users Liaison Group, on the ways in which the payment systems can best be prepared for the introduction of the ECU. The Commission will inform the Consumer Consultative Council thereof.

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(8) OJ No C 153,4.6.1994, p. 3.

III.2 Simplification of reporting requirements for Balance of Payments statistics

In most Member States there are special reporting requirements primarily for establishing balance of payments statistics in respect of transactions which exceed a certain value threshold and which involve payments to, or from, non-resident accounts. These requirements raise the cost and can increase the delay in making such transactions by comparison with domestic payments. Moreover, the nature of the requirements enforced in the Member States often differs.

In its March 1992 working document, the Commission stated that it would work towards a high minimum reporting value threshold, which in its view should be at least ECU 10 000. The possibility of standardising the format for reporting transactions above the threshold would also help to simplify these procedures.

The Commission stresses the need for rapid progress in the work currently under way in a Task Force of government experts under the aegis of the Commission on simplifying and harmonising the reporting procedures used throughout the Community.

III.3 "Legal Framework" for cross-border payments

In its March 1992 working document, the Commission noted that certain features of the law in a number of Member States, together with the differences between Member States' laws relating to payment systems, were a source of uncertainties and risks. This view was endorsed by the Committee of Governors of the central banks of the EC[9].

Work began on these issues in a group of government legal experts and central bank representatives, chaired by the Commission, early in 1993. The first phase of the work has consisted of establishing an inventory of the legal situation in the areas of payment netting, settlement finality and credit transfers, in all Member States, which has led to a more precise identification of these problems.

The next phase of the work is to explore the potential solutions and their consequences. The Commission is conscious of the fact that, to both central banks and commercial banks, the reduction of systemic risks in payment systems could make a significant contribution to the efforts being made to improve Europe's payment systems.

The Commission, with the assistance of its working group on the legal framework for cross-border payments and in association with the EMI, will make every effort to reach operational conclusions, including the possibility of a proposal for a directive, on the question of settlement finality during 1995.

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(9) "Issues of common concern to EC Central Banks in the field of payment systems", by the Ad Hoc Working Group on EC payment systems, September 1992.

III.4 Linkages between automated clearing houses (ACHs)

In most Member States, Automated clearing houses, or systems, process millions of payments every day in a rapid, efficient and economical way. The economies of scale are such that the marginal cost of each payment is a tiny fraction of the present cost for a typical cross-border payment. The Commission noted in its 1992 working document the potential benefits which could result from linkages between ACHs and stated its support for the efforts being undertaken by a number of banks and ACHs in this direction.

Since 1992, a number of feasibility studies on ACH-linkages have been carried out, which have demonstrated the technical feasibility of such projects. Full implementation of many of these projects has however been impeded by what is often claimed to be the absence of sufficient volume of cross-border payments and, therefore, the lack of a business case. An encouraging development has been the commencement in 1994 of a pilot linkage between the Belgian and German ACHs, which others are following with interest.

The Commission welcomes the developments aimed at the establishment of ACH-linkages, which it considers as a longer term response to the payment requirements of an internal market and - to an even greater extent - of an Economic and Monetary Union. The Commission will maintain contact with all interested parties to assess how best to contribute to progress in this area.

III.5 Transparency of payments made by means of a payment card

The Commission, in its March 1992 working document, recognised that the infrastructure for card payment systems was already quite satisfactory. However, users pointed out, and the European Credit Sector Associations (ECSAs) recognised, that there was room for improvement in the transparency of customer information with regard to card payment instruments. The Commission therefore invited the ECSAs to review the information given to customers about direct or so-called face-to-face payments, in the light of the Guidelines elaborated for remote cross-border payments.

Following an inconclusive review of the situation by the ECSAs and in the light of continuing demands for improvements on the part of users, the Commission has decided to launch an independent study. This should be finalised by June 1995 and its purpose is:

- to examine which information a customer should receive in order to make the best use of a payment card, to evaluate the cost of card payments and to be informed about mutual responsibilities;

- to collect and examine a representative sample of standard contracts between card-issuers and card-holders and statements which a customer receives subsequent to his transactions;

- to compare the results of the first two phases to determine whether the information necessary to customers is given in actual practice and, if so, whether it is given in appropriate ways;

- to indicate which improvements seem objectively justified.

The Commission will discuss the study results with its two consultative groups on payment systems. In the light of this consultation, the Commission will consider whether any improvements are necessary and, if so, how best to put them into effect. The Commission will look to the European Credit Sector Associations and issuers of payment card instruments to ensure that any such improvements are voluntarily addressed by 1st January 1996. In the light of progress achieved in this area, the Commission will consider whether a legislative instrument might be appropriate.

III.6 Pre-paid cards (electronic purses)

One development which has come a considerable way towards realisation since 1992 is the pre-paid payment card, which instead of being merely an access device into a bank (or other) account, contains in itself a pre-paid store of value, for spending.

The Commission has an interest in these developments under three main headings. In the first place, it is likely that these new instruments will in due course give rise to a number of questions of a regulatory nature. Some of these questions have already been considered by the European Monetary Institute[10]. The EMI concluded that only banks should issue such cards.

Secondly, the Commission has an interest in the promotion of a competitive European technology in this, as in other areas. Under the ESPRIT programme, a project known as CAFE[11] (Conditional Access For Europe) was launched in 1993 and has developed a prototype electronic purse system. This will be tested during 1995 in Commission premises. The Commission has recently invited[12] interested parties to take part in or observe the trial of the instrument.

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(10) Report to the Council of the European Monetary Institute on Prepaid Cards, by the Working Group on EU Payment Systems, May 1994.

(11) CAFE is the ESPRIT technological project No EP 7023.

(12) OJ No C 230 , 19.8.1994, p. 35 (94/C 230/08).

Finally, the scope for using pre-paid instruments for low value cross-border payments is of potential importance. This function can be seen under two aspects. On the one hand, a pre-paid card can be loaded with any currency including the ECU, if so designed, and would therefore provide a convenient instrument during the present multi-currency stage of the Community; on the other hand, the pre-paid card may provide an extremely convenient and "user friendly" means of adapting to the use of the ECU.

The Commission has decided to launch a study on the regulatory implications in its field of competence, in particular concerning the stability of the banking system, the protection of consumers and the promotion of interoperable cross-border banking services.

The Commission will disseminate the conclusions drawn from its study on pre-paid cards after discussing them with its two consultative groups on payment systems and the EMI.

ANNEX 1

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on cross-border credit transfers

EXPLANATORY MEMORANDUM

I. Background

The present proposal for a directive is the result of a process, consisting of a number of steps, which can be summarised as follows:

A. In 1990, the Commission adopted Recommendation 90/109/EEC[1] (1990 Recommendation) on the transparency of banking conditions relating to cross-border financial transactions. The Commission recommended that "Member States ensure that institutions which undertake cross-border financial transactions ..... apply the principles set out in the Annex". The said Annex laid down the basic principles relating to:

- ex-ante customer information concerning cross-border financial transactions (*1st principle*);
- ex-post customer information about the commission fees and charges and the exchange rate applied (*2nd principle*);
- the alternative ways of apportioning commission fees and charges between customers (originator and beneficiary), including the method to be applied by the customer's institution to ensure that the beneficiary is credited with the exact amount shown on the transfer order (*3rd principle*);
- in the absence of an agreement to the contrary, an obligation for each intermediary institution to deal with a payment order within two working days of receipt of the funds, including a partial refund of the costs of the transaction in the event of any delays in the execution (*4th principle*);
- unless otherwise stipulated in the payment order, an obligation for the beneficiary's institution to deal with a payment order not later than the working day following receipt of the funds (*5th principle*);
- an obligation for institutions participating in a cross-border payment to be capable of dealing rapidly with customer complaints, including the possibility for customers to refer the matter to one of the Member States' bodies, to be created to this effect, competent to deal with such complaints (*6th principle*).

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[1] OJ No L 67, 15.3.1990, p. 39.

B. The results of a study[2] of the market ("Cost transparency in cross-border financial transfers") carried out in the first quarter of 1992 and presented in August 1992 revealed a number of shortcomings relating to the aspects covered by the 1990 Recommendation.

C. The implementation of the 1990 Recommendation was discussed in the Commission's two advisory groups, Payment Systems Technical Development Group (PSTDG) and Payment Systems Users Liaison Group (PSULG) whose members are drawn from banks, central banks, consumers, retailers and small businesses.

In the PSULG, the European Credit Sector Associations, consumers, retailers and SMEs discussed and agreed on "European Banking Industry Guidelines for Customer Information on Cross-border Remote Payments" ("Industry Guidelines") which were annexed to the Commission Working Document "Easier cross-border payments: Breaking down the barriers"[3]. The industry Guidelines, covering the 1st and 2nd principles of the 1990 Recommendation, were to be implemented by 31 December 1992.

In the 1992 Working Document the Commission clearly stated that it would monitor the implementation of the **Industry Guidelines** and, should the self-regulatory efforts by the banking industry not have led to a satisfactory implementation, it would bring about the necessary legislation to provide a statutory framework for customers' rights (*para. 64*). The Commission additionally indicated that it would look to the banking sector to ensure that the practice of **"double charging"** (i.e. unauthorized deductions from the principal amount transferred) was ended by the 31 December 1992. If problems persisted, the Commission would examine whether other measures were needed to end such double charging (*para. 26*). As to **timing** of cross-border transactions, the Commission announced that it would be "looking to those operating systems to set demanding targets for themselves and to include these in the information they provide to customers". The Commission would review progress in early 1993 (*para. 28*).

D. Further to the Commission working document, the European Parliament adopted a resolution[4] on 12 February 1993 in which it expressed the opinion that "*the principle of transparency ought to be defined by a Council directive entailing the following rules:*

- *an obligation for the bank to inform the potential user of the various means of effecting payments which it is able to offer and their respective costs;*
- *the user's right to bear all charges concerned with a cross-border payment, which should automatically exclude 'double charging';*

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(2) A report prepared for the Commission of the European Communities (Consumer Policy Service) by the Bureau Européen des Unions de Consommateurs (BEUC).

(3) SEC(92) 621 final of 27 March 1992.

(4) Resolution A3-0029/93 concerning the systems of payments in the context of Economic and Monetary Union.

- *a four-working day period for the settlement of the cross-border payment;*
- *the user should have access to a redress procedure; the Commission will need to provide a suitable appeal mechanism for small and medium-sized businesses."*

E. With a view to meeting the commitments laid down in its working document and having regard to the European Parliament's resolution, the Commission carried out a study[5] in the first half of 1993, the results of which were announced on 29 July 1993. These results confirmed the shortcomings revealed by the 1992 study.

F. On the basis of these results, and after wide consultation of all interested parties (commercial banks, central banks, consumers, SMEs and retail trade), the Commission adopted on 14 December 1993[6] the following plan of action, contained in a Communication from Mr Vanni d'Archirafi and Mrs Scrivener:

"The banking industry is given a grace period to achieve the desired results in terms of transparency and performance through self-regulation, but under the threat of possible legislation. The Commission will examine the progress of the banking industry on performance and transparency by conducting a second and definitive study at the beginning of 1994, i.e. one year after the first study has been carried out and the implementation deadline for the Industry Guidelines has elapsed.

If the second study shows that the banking industry has failed to make sufficient progress, the Commission will propose legislative action in the form of a binding instrument (a directive). To establish whether sufficient progress has been made, the following criteria will be applied:

- *full written information, in accordance with the different items listed under the Industry Guidelines, should be provided in at least two thirds of branches surveyed (in February 1993 4%);*

- *the problem of "double charging" should be eliminated; a maximum incidence of double charging of 10% (in February 1993 43%) would be tolerated;*

- *in accordance with principle 4 of Recommendation 90/109/EEC, each bank involved in a cross-border transfer should execute the payment no later than the business day following receipt of the payment order. The Commission will assess progress, notably by reference to the results of the previous study.*

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(5) "Remote cross-border payment services: transparency in conditions offered and performance of transfers executed": Report for the Commission of the European Communities (DG XV) by Retail Banking Research Ltd.

(6) SEC (93) 1968: "Transparency and performance of cross-border payments".

To reinforce the Commission's readiness to introduce binding measures, a first draft proposal for a directive has been prepared and [was] annexed to the [December 1993 Communication]. As soon as possible, the Commission will convene a working party of government experts to examine this draft, and on the basis of comments received from this group and elsewhere the text may be amended, in readiness for its adoption, should this prove to be necessary in the light of the proposed second study."

In its Communication to the Council of 22 December 1993[7], the Commission repeated its commitment to take appropriate action, including lesgislative action, in the event that financial institutions did not take adequate steps to introduce more transparent and more efficient cross-border payment services.

G. To implement the Commission's action plan, a second and definitive study was launched in the first half of 1994, the results of which are the following:

- no written information was available in 50% of bank branches surveyed; in the majority of the remaining cases, the written information available was not in accordance with the Industry Guidelines;

- 36% of the transfers were subject to unauthorized deductions from the principal amount transferred ("double charging");

- the average time taken to carry out transfers did not improve in comparison to the 1993 study;

- the average total cost of making a cross-border credit transfer of an amount equivalent to ECU 100 was ECU 25.4.

H. In its Opinion[8] of 6 July 1994, the Economic and Social Committee stated a preference for a code of good conduct. However, the Economic and Social Committee advised that, if a directive were to be proposed, it should be limited to setting out a general framework. The present directive follows this model, by allowing a large measure of freedom of contract.

In its resolution[9] of 29 September 1994, the Council of the European Union invited the Commission to ensure that the obstacles to cross-border payments are removed.

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(7) COM(93) 632 final: "Making the most of the Internal Market: Strategic Programme".

(8) ESC 854/94.

(9) SI(94)901, Annex 4, section V: "Council Resolution on giving full scope to the dynamism and innovatory potential of small and medium sized enterprises, including the craft sector and micro-enterprises, in a competitive economy".

Overall assessment

The Commission Strategic Programme clearly identified the establishment of effective cross-border payment systems as one of the few requirements that still need to be met to ensure the functioning of the Internal Market, as the latter enters into its maturity stage. The need for action in this domain, which is designed to secure an improvement of cross-border payment services for the benefit of consumers, individual and unincorporated businesses and SMEs, is all the more urgent as progress is made towards full Economic and Monetary Union. This need is confirmed by the increasing number of complaints addressed to the Commission and by the results of the repeated surveys carried out by the Commission.

The steps summarised in sections 1.A to 1.H above, of which the 1994 study is one element, point to an overall trend which has not demonstrated the expected improvements. The Commission therefore considers that little progress appears to have been made and that a legally binding instrument is now timely and appropriate. Therefore, the Commission has proposed a directive, a detailed description of which is made in section III below, setting out what may be considered as a number of essential conditions related to the transparency and the performance of cross-border credit transfers.

Whilst covering all cross-border credit transfers irrespective of the amounts involved, the scope of the present proposal is primarily intended to address the needs of consumers, individual and unincorporated businesses as well as SMEs which traditionally, but not exclusively, carry out lower-value cross-border transactions.

The present proposal is also intended as a supportive measure which will encourage banks to review their systems to ensure that the quality of the services they publicise is effectively matched by the actual quality of service, while ensuring that appropriate protection is afforded to users of credit transfer services. In doing so, the banks will be in a position to identify and eliminate internal inefficiencies, thus significantly contributing to the progressive lowering of the cost of service production and, consequently, the break-even point by reference to which they decide their charging policy vis-à-vis users. Finally, institutions will need to invest in staff training and in the development of a true "cross-border payment service" culture on which to build a competitive advantage, as is the case for domestic transfers.

II. Subsidiarity assessment

1. Which are the objectives of the directive, having regard to Community obligations?

The principal objective is to ensure that in an Internal Market, cross-border credit transfers may be made free of any impediment. The present directive is intended as a supportive measure in respect of the exercise of the four freedoms stated in Article 7a of the Treaty, in particular the free movement of goods, persons, services and capital, while ensuring a high level of consumer protection.

The present directive is also intended, following up from the liberalisation of capital movements as reached during stage I of Economic and Monetary Union (EMU), as a further step towards the progressive implementation of full EMU.

2. Does the action envisaged stem from an exclusive competence of the Community?
Exclusive competence: Article 100a, in conjunction with Article 7a.

3. What are the possibilities of action available to the Community

One possibility is a voluntary approach. This has however already been pursued since 1990 (Commission Recommendation 90/109/EEC) and throughout the consultation process which has led to the Communication of 14 December 1993, but has not yielded the expected results.

Therefore, as explained in detail in section I above, a binding instrument is now deemed both timely and necessary.

4. Is uniform legislation necessary or is a directive setting out the general objective and leaving implementation thereof to the Member States sufficient?

For the reasons set out in section I above (Background), 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 remote cross-border payments 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 of a more detailed nature which are designed to give weight to the preceding transparency rules. Considering the cross-border nature of the payments in question, legislation at national level would not suffice unless it were adopted in a substantively similar way in each Member State. The present directive describes what may be considered as a number of essential conditions. These conditions, although of a detailed nature, allow those institutions wishing to provide cross-border credit transfer services an almost complete freedom of contract.

Institutions decide themselves on the detailed specifications of the services they offer. The directive underpins these specifications and sets out fall-back rules in case any essential details were not specified by the institution. Only one rule in this section is mandatory, although having a limited number of opt-outs, i.e. the clause setting out the obligation to safeguard funds of customers (where funds are mislaid or lost).

III. Detailed commentary on the Articles

Article 1

1. The service of effecting and receiving cross-border credit transfers on behalf of customers is, for the most part, carried out by credit institutions (banks). However, the provision of certain types of payment services may be carried on, at least in some Member States, by other institutions (e.g. postal banks). It is considered right that the same minimum standards of performance set out in the directive should apply also to these other institutions.

   The directive does not apply to institutions to the extent that they do not normally offer their services to the public, e.g. central banks offering their services to credit institutions (see also definitions at Article 2 below).

Article 2

(e) The definition of "payment" is based on that drawn up by the Committee on Payment and Settlement Systems of the central banks of the Group of Ten countries, with an addition to make it clear that a movement of funds by one person, from one account of his to another account of his, is included in the definition of payment.

(f) In order for payments to come within the scope of the directive, there must be a cross-border dimension. The cross-border dimension clearly exists where the institutions of the originating and the receiving parties are in different Member States.

(i) The Directive is intended to benefit "customers", whether these be the originator or the beneficiary, or both, as the context may require. Its general thrust in so doing is to provide that each institution in the payment chain is responsible to the party which instructed it.

(j) The scope of the directive is limited to payments which are not made by means of personal face to face contact between the payer and the payee, present together at the place where the instrument of payment is used.

(k) "Credit transfers" are a means of remote cross-border payment, consisting of a series of operations, the initiative for which comes from the originating party and his bank. They are, in banking terms, distinguished from debit transfers (cheques, direct debits etc.) where the sum is "collected" by the receiving party's bank. Debit transfers are not within the scope of the directive, due to the important differences in the roles of the parties to debit transfers and in the parties' rights and responsibilities.

(l) "Force majeure" is based on the definition used in the Council directive relating to package holidays[10]. Additionally, for the purpose of this directive, it does not include the insolvency of an intermediary bank due to the particular need for protection of customers. Such a risk cannot be assessed or controlled by the customer, who does not choose the intermediary bank.

(m) Some accounts are "interest" bearing for customers and in this case there will necessarily be a rule applied by each customer's institution for determining the date from which interest will run on sums posted to the account. Where this is not the case, the test to be applied is that of availability of funds, i.e. the date on which the customer may freely withdraw the funds from his account. The definition takes into account the different rates of interest applicable for different periods, e.g. overnight rates or rates for longer periods.

(o) An institution is not obliged under the directive to give effect to a payment order unless and until it has "accepted" the order. One important pre-condition for such acceptance will generally be that its customer must have a sufficient credit balance on his account to pay for the remote cross-border payment which he has ordered, or alternatively that an agreed credit facility is in place. The term "financial cover" is intended to cover these alternatives.

(p) In the domestic payment systems of several Member States a credit transfer is not legally completed until the funds have been credited to the account of the beneficiary; the definition of completion stops slightly short of the rule just cited. Responsibility for any further delays in crediting the amount of the credit transfer to the beneficiary or for a failure within the beneficiary's bank occurring after acceptance, as defined, is a matter between the beneficiary and his bank. Similarly, the responsibility of the beneficiary's bank in respect of the obligation to execute in accordance with the payment order is a matter between the beneficiary and his bank.

Article 3

The information requirements set out in this Article follow very closely the Industry Guidelines[11] issued on a voluntary basis in 1992 by the European Credit Sector Associations (ECSA's). Those were, in turn, based on the requirements expressed by consumer and other user group representatives in consultation with the Commission in its Payment Systems Users Liaison Group.

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(10) The EC Council Directive provides for the following definition: "Force majeure: unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised" (90/314/EEC - OJ No L 158, 13.6.1990).

(11) "European Banking Industry Guidelines on Customer Information on Cross-border Remote Payments" of 2 March 1992 drawn up by the Banking Federation of the EC, the European Savings Banks Group and the Association of Cooperative Banks of the EC.

Article 4

The information requirement set out in this Article covers the *ex post* information which customers require, e.g. by way of a statement, a separate information slip, etc., subsequent to their making or receiving, as appropriate, a cross-border credit transfer.

Article 5

Very few credit transfers are handled entirely by one institution. Moreover, unlike payments in the domestic systems of most Member States, which run to strict rules including time scales, many credit transfers are made between banks which have no such arrangements between them. This Article is designed to both re-inforce and underpin the published or agreed time scale agreed by the institution, by promoting the following principle. Unless the institution has clearly informed its customer of a different period (e.g. in its literature, on the payment order form etc.), the contractual time scale will in effect become 5 days, maximum, for completion of the payment. The institution of the beneficiary shall place the funds at the disposal of the beneficiary at the latest by the end of the business day following acceptance of the payment order.

The Article fills the lacunae between the comparable payment systems within the Member States, which run to strict rules on time scales, and the small - although growing - number of contractual credit transfer schemes between groups of banks which already have contractual rules on timing. Existing and future contractual arrangements will not be affected by the Article, provided that the transparency obligations towards the customer are respected.

The originator's compensation for late payment is limited to interest from the latest date by which the payment should have been completed. Consequential losses are not recoverable under the directive, but this is without prejudice to the claims which might be upheld under domestic laws.

Article 6

This Article is aimed at instances where instructions by the originator, in respect of charges, are not correctly carried out. This gives rise to a phenomenon, common known as "double charging". These problems arise when a credit transfer, having been ordered by the originator on the basis that he would pay all associated fees - so that the beneficiary would receive 100% of the payment amount - is further charged with fees en route to the beneficiary's account. Bankers are agreed that this is wrong, but are faced with the difficulty that in many instances a bank has little knowledge of or control over the practices of all the banks with which it must deal in order to effect a credit transfer.

The rule is intended to underpin the attempts currently being made by the banking industry to eliminate the practice, which causes serious disturbance to the trading relations of its business customers and understandable inconvenience and expense to consumer customers.

The customer's instructions about charges are, under existing international banking practice, normally recorded on the face of a credit transfer by the expression "BEN" for a transfer where all fees in respect of the credit transfer are to be deducted from the amount due to the beneficiary, or "SHA" for one where the paying customer shares the burden of fees, by paying those of his own bank leaving the fees of other banks to be deducted from the amount due to the beneficiary. A credit transfer where all fees are for the account of the originator generally bears the description "OUR". This will, under the directive, become the rule on which an institution must fall back if its customer has not given an instruction to the contrary. The onus will be on the institutions to ascertain the customer's instruction and to correctly incorporate it in the payment order.

Charges which have been deducted without authority are to be refunded. The originator's bank is responsible for the correct execution of the payment order up to acceptance by the beneficiary's bank of the related funds, which is defined as completion. Where deductions occur beyond this point, i.e. within the beneficiary's bank, the beneficiary's bank becomes responsible. The directive provides for a mechanism whereby the originator may, at his choice, direct the refunded amount to the beneficiary. Whether the originator decides to avail himself of this option will depend on a number of factors, such as the particular nature of the underlying contractual relations between the originator and the beneficiary.

Article 7

This Article provides each party to a credit transfer with an important right, in cases where transfers are badly delayed or "lost" in the system. The customer claims from his institution, which in turn claims on the institution which it had instructed (as its agent) to forward the transfer. There is a strict liability for payments under 10.000 ECU in value. A bank may however derogate from this in respect of events of "force majeure". This liability appears justified for three main reasons:

- the customer himself has no rights, or no effective rights, against any of the intermediary institutions used to make the transfer; he will generally not even be aware of their identities;

- the originator's institution has generally selected the institutions through whom the transfer will pass, or at least the first such institution; the originator's institution is therefore in a position to exercise competitive pressure in the market by selecting reliable intermediary institutions;

- the originator will have paid his institution a fee for the transfer of his funds. If, contrary to his legitimate expectations, the funds do not arrive, he should as a minimum be entitled to their return, under the principle of safe custody.

In a commercial setting, an originator whose payment becomes lost will often find himself facing a claim for interest from his beneficiary, whose due date for payment may have passed. As a reasonable flat rate compensation the Article provides for the payment of interest. The burden of this interest payment will however, under the "chain" principle of credit transfers, ultimately fall on the institution responsible for the delay or loss, unless that institution has become insolvent (in which case the burden rests with the originator's bank). It should be added that the institution responsible for the delay may also have had the opportunity to benefit from the "float" attached to the delayed funds, so that there is an element of restitution applicable to the interest penalty.

The principle of the right to refund, substantially as set out in this Article (but without the possibility of derogation), has recently been recommended to its member governments by the United Nations Commission on International Trade Law and has been enacted in the laws governing the major payment systems of the United States, for domestic and international credit transfers.

Proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on cross-border credit transfers

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the European Monetary Institute,

In accordance with the procedure laid down in Article 189b of the Treaty,

Whereas the volume of remote cross-border payments is growing steadily as the completion of the internal market and the progressive move towards full economic and monetary union lead to greater trade flows and movement of people throughout the Community; whereas cross-border credit transfers account for a substantial part of the volume and the value of remote cross-border payments;

Whereas it is of paramount importance for individuals and businesses to be able to make credit transfers rapidly, reliably, and cheaply from one part of the Community to another; whereas a market in which there is competition for cross-border credit transfers should lead to improved services and reduced prices;

Whereas this Directive intends to follow up the progress towards the liberalization of capital movements reached during stage 1 of economic and monetary union; whereas it takes account of the purpose of facilitating the use of the ECU set out in the Treaty; whereas it is conceived as a step towards the progressive implementation of economic and monetary union; whereas its provisions should apply to credit transfers in any currency, including the ECU;

Whereas this Directive is intended to implement one aspect of the programme of work drawn up by the Commission following its Green Paper "Making payments in the internal market";

Whereas the Commission has recommended to Member State that the threshold below which cross-border payments should not have to be reported should be fixed at not less than ECU 10 000;

Whereas the Committee of Governors of the central banks of the Member States recommended that payment systems in all Member States should have a sound legal basis; whereas the Commission has set up a working group on the legal framework for cross-border payments, which consists of legal experts of governments and of the EMI; whereas this group has advised the Commission that the issues covered by this Directive may be dealt with separately from the systemic issues which remain under consideration; whereas it may be necessary to make a further proposal to cover these systemic issues, principally settlement finality;

Whereas the purpose of this Directive is to improve cross-border credit transfer services and thus assist the EMI in its task of promoting the efficiency of cross-border payments with a view to the preparation of the third stage of Economic and Monetary Union;

Whereas, having regard to the third paragraph of Article 3b of the Treaty, this Directive lays down the minimum requirements needed to ensure an adequate level of customer information; whereas greater transparency is ultimately dependent on institutions' adherence to minimum performance requirements; whereas this Directive lays down the minimum performance requirements which institutions offering cross-border credit transfer services should adhere to; whereas this Directive fulfils the first, second, third, fourth and fifth principles set out in Commission Recommendation 90/109/EEC[1]; whereas it is without prejudice to Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering[2];

Whereas the nature of cross-border credit transfers, being a series of operations involving institutions in different Member States, is such that a coordinated approach at Community level is appropriate and necessary; whereas a self-regulatory approach has been attempted by the Commission by its Recommendation 90/109/EEC; whereas this voluntary approach has not achieved the desired results; whereas a binding measure is therefore appropriate;

Whereas this Directive should apply to credit transfers for any amount; whereas institutions should be under an obligation to refund in the case of a non-completed transfer; whereas the obligation to refund imposes a contingent liability on institutions which might, if the possibility were not given to exclude high-value transfers, have a prudential effect on the solvency requirement; whereas the possibility of derogation (by Member States and, if so exercised, by institutions) from this obligation should be provided only in the case of high-value payments of more than ECU 10 000; whereas this threshold does not apply to any other Article of this Directive;

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(1) OJ No L 67, 15.3.1990, p. 39.
(2) OJ No L 166, 28.6.1991, p. 77.

Whereas the European Parliament, in its Resolution of 12 February 1993, called for a Council Directive to lay down rules in the area of transparency and performance of cross-border payments;

Whereas the Economic and Social Committee, in its Opinion of 6 July 1994, stated a preference for a code of good conduct; whereas the Commission has previously pursued this approach; whereas the Economic and Social Committee advised that, if a directive were to be proposed, it should be limited to setting out a general framework; whereas this Directive follows this model, by allowing a large measure of freedom of contract;

HAVE ADOPTED THIS DIRECTIVE:

SECTION I

Scope and definitions

Article 1

Scope

1. Member States shall apply the requirements of this Directive to credit institutions and to other institutions which supply credit transfer services to the public as part of their business.

2. This Directive shall apply to credit transfers in any currency, including the ECU, and for any amount save where the derogation in Article 7(3) has been exercised.

Article 2

Definitions

For the purpose of this Directive:

(a) "credit institution" shall mean an institution as defined in Article 1 of Council Directive 77/780/EEC[3]; for the purposes of this Directive, branches of credit institutions in different Member States are deemed to be separate institutions;

(b) "other institution" shall mean any legal person, other than a credit institution, that supplies to the public, by way of business, credit transfer services ;

(c) "institution" shall mean a credit institution or other institution;

(d) "person" shall mean either a legal or a natural person, as the context may require;

(e) "payment" shall mean the transfer by an originator of a monetary claim on a party acceptable to the beneficiary, including cases where the originator and the beneficiary are the same person;

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[3] OJ No L 322, 17.12.1977, p. 30.

(f) "cross-border payment" shall mean a payment by an originator whose account, from which the payment is made, is held by an institution or its branch in one Member State, to be made available to a beneficiary at an institution or its branch in another Member State;

(g) "originator" shall mean a person that authorizes the making of a credit transfer to a beneficiary;

(h) "beneficiary" shall mean the final recipient of a credit transfer;

(i) "customer" shall mean the originator or the beneficiary, as the context may require, and may be one and the same person;

(j) "payment order" shall mean an instruction in any form, given direct to an institution, to place at the disposal of a beneficiary a fixed or determinable amount of money.

(k) "credit transfer" shall mean a cross-border payment, consisting of a series of operations beginning with the originator's payment order. The term includes any payment order issued by the originator's institution or any intermediary institution intended to carry out the originator's payment order;

(l) "force majeure" shall not include the insolvency of an intermediary institution but shall otherwise have the meaning ascribed to it in indent (ii) of the second subparagraph of Article 4(6) of Council Directive 90/314/EEC[4];

(m) "interest" shall mean the inter-bank offered rate, increased by two percentage points, in the relevant market for deposits in the currency of any given payment, calculated for the period of the delay;

(n) "value date" shall mean the date on which the customer's account is debited (for originators) or credited (for beneficiaries) such date being that applied by the institution of the customer for the purpose of calculating interest (if any) on the account or assessing the availability of funds, where interest is not an appropriate criterion;

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[4] OJ No L 158, 23.6.1990, p. 59.

(o) "acceptance" shall mean the acceptance by an institution of a payment order, upon fulfilment of the institution's conditions as to the availability of financial cover and the identification of the parties named in the payment order and any other pre-conditions agreed by the parties;

(p) "completion" of a credit transfer shall mean acceptance by the beneficiary's institution;

(q) "intermediary institution" shall mean an institution which is neither that of the originator nor that of the beneficiary;

(r) "business day" in relation to any particular institution shall mean a day, or part of a day, on which that institution is open for the processing of credit transfers.

SECTION II

Transparency of conditions for credit transfers

Article 3

Information prior to a credit transfer (made or received)

The institution shall supply its customers with clear written information about the services it provides to effect or receive credit transfers. This information shall include:

- an indication of the time needed for the funds to be credited to the account of the beneficiary's institution or to the beneficiary, as appropriate;

- the basis of the calculation of any commissions and charges payable by the customer to the institution;

- the value date, if any, applicable by the institution;

- a reference to the redress procedures available to the customer and the method of gaining access to them.

Article 4

Information subsequent to a credit transfer (made or received)

The institution shall supply its customers with clear written information subsequent to their making or receiving a credit transfer. This information shall at least include:

- a reference enabling its customer to identify the payment;

- the amount of any charges payable by its customer. Where the originator has authorized a deduction from the amount of a credit transfer, this fact and the original amount of the credit transfer should be stated by the beneficiary's bank to the beneficiary;

- the value date, if any, applied by the institution.

SECTION III

Minimum obligations of institutions in respect of credit transfers

Article 5

Obligation to execute in good time

1. Each institution having accepted a payment order shall execute the related credit transfer within the time scale agreed with the customer (or institution) making the payment order. In the absence of a specific agreement as to the time scale, the institution shall act soon enough to enable its published clear time scale to be achieved. Where there is neither a specific agreement nor an applicable published time scale, the following obligations shall apply:

   - the institution of the originator shall be responsible to the originator for ensuring that the credit transfer is completed no later than the end of the fifth business day following acceptance by it of the payment order from the originator; and

- the institution of the beneficiary shall be obliged to place the amount of the credit transfer at the disposal of the beneficiary, at the latest by the end of the business day following completion of the credit transfer.

2. The originator's institution shall compensate the originator by the payment of interest on the amount of the credit transfer where it is completed late, but shall not be liable for consequential losses under this Directive. No compensation shall be payable where the originator's bank can establish that the delay was attributable to the originator.

3. In addition to the obligation of execution in paragraph 1, the beneficiary's institution shall compensate the beneficiary by the payment of interest on the amount of the credit transfer where it is late in being placed at the beneficiary's disposal.

Article 6

Obligation to execute in accordance with the instructions contained in the payment order

1. The originator's institution, any intermediary institution and the beneficiary's institution, once they have accepted the payment order, shall each be obliged to execute the related credit transfer for the full amount thereof unless authorized to make a deduction therefrom. Without prejudice to the duty not to deduct, the beneficiary's institution may, where appropriate, levy an additional charge on the beneficiary relating to the administration of his account. However, any such additional administrative charge shall not exceed the charge that would be made for a domestic credit transfer.

2. Where a breach of the duty to execute in accordance with the payment order as described in paragraph 1 has been caused by any institution other than the beneficiary's institution, and without prejudice to any other claim which might be made, the institution of the originator shall be liable to credit to the originator any sum wrongly deducted by any institution, at its own cost. Alternatively, if required to do so by the originator it shall transfer such amount to the credit of the beneficiary, free of all deductions, at its own cost. Any intermediary institution making a deduction in breach of the duty in paragraph 1 shall be liable to credit the sum so deducted to the institution of the originator. Alternatively, if required by the institution of the originator, it shall transfer such amount, free of all deductions, to the credit of the beneficiary, at its own cost.

3. Where a breach of the duty to execute in accordance with the payment order has been caused by the beneficiary's institution, and without prejudice to any other claim which may be made, the beneficiary's institution shall be liable to credit to the beneficiary, at its own cost, any sum wrongly deducted.

Article 7

Obligation of institutions to refund in case of non-completed credit transfers

1. If, after a payment order has been accepted by the originator's institution, the related credit transfer is not for any reason completed, and without prejudice to any other claim which may be made, the originator is entitled to have his account credited on demand with the full amount of the credit transfer plus interest and the amount of the charges for the non-completed credit transfer, such demand to be made not earlier than 20 business days after the date on which the credit transfer should have been completed. Each intermediary institution which has accepted the payment order likewise owes an obligation to refund at its own cost the amount of the credit transfer to the institution which instructed it.

2. If the non-completion of the credit transfer was caused by defective instructions given by the originator to his institution, the originator's institution and the other institutions involved shall use their best endeavours to make the refund referred to in paragraph 1.

3. Member States may allow institutions to derogate by contract from the obligation to refund, as described in paragraph 1, in the following cases:

   - where the non-completion of the credit transfer is due to force majeure; or

   - for payments above ECU 10 000.

SECTION IV

Final Provisions

Article 8

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 31 December 1996 at the latest. They shall forthwith inform the Commission thereof.

   When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by this Directive. In this Communication Member States shall provide a table of correspondence showing the national provisions which exist or are introduced in respect of each article of this Directive.

Article 9

Report to the European Parliament and the Council

No later than 31 December 1999, the Commission shall present a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.

Article 10

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 11

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

BUSINESS IMPACT ASSESSMENT

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
on cross-border credit transfers

1.a. Taking account of the principle of subsidiarity, why is Community legislation necessary and what are its main aims?

In order to reap the full benefits of the single market and Economic and Monetary Union, it is of paramount importance for individuals and businesses to be able to make payments as rapidly, reliably and cheaply from one part of the Union to another as is now the case for payments within the Member States with the most efficient national payment systems. The purpose of the present proposal is first of all to lay down the minimum requirements needed to ensure an adequate level of customer information. Firstly, this covers the ex-ante information about the various possibilities open to users for sending funds across frontiers, which will enable them to make a better informed choice and ultimately contribute to the overall efficiency of cross-border payments by exerting a downward pressure on prices. Information also needs to be given in respect of cross-border payments after they have been made. In order to ensure that institutions are able to perform in accordance with the transparency conditions, minimum standards of performance are required, given the large number of such institutions within the Union.

Therefore, the present proposal also sets out such minimum standards of performance, as are deemed necessary in view of the abovementioned fundamental objective.

Considering the cross-border nature of the payments in question, legislation at national level would not suffice unless it were adopted in a substantively similar way in each Member State. The most efficient way of achieving the aims set out above is by way of directive laying down the necessary minimum standards.

1.b. Are there likely to be any wider benefits and disadvantages from the proposal?

The process of implementing these transparency and performance requirements is expected to require institutions to review their systems for making cross-border payments and therefore to bring about greater efficiencies. At the same time, customers will be in a position to make a well-founded choice between different services offered as well as between different institutions. These factors are likely to contribute to a progressive and significant reduction in the cost of making cross-border payments, equalling in the medium/long term an estimated minimum of ECU 10 billion per year[1], presently borne

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(1) The 1994 study carried out by the Commission indicates that the average total cost of a 100 ECU cross-border credit transfer is 25. ECU. However, 100 ECU may be considered as a relatively low value for a credit transfer, and thus likely to have attracted the minimum charge applicable to such transactions. The European Credit Sector Associations have remarked that more typical transactions are those for an average amount of at least 1 500 ECU. It is believed that cross-border credit transfers in this latter value range would attract a higher charge, which may prudently be estimated at approximately 30 ECU. This compares with an average charge for comparable domestic transfers rarely exceeding 2 ECU (if charged at all). Figures for 1991 indicate the volume of cross-border credit transfers at 117.6 million. A prudent estimate of the medium/long term volume of such transfers has been made on the basis of the yearly increment over the period 1989-1991 (in excess of 15% per annum), as well as taking into account the increase in EC SWIFT messages over the period 1991-1993 (cat. 1, customer transfers). On the assumption that the reference rate of increment would hold unchanged, it can prudently be estimated that in the medium/long term, i.e. over the next five years leading up to the year 2000, the volume of cross-border credit transfers will increase by approximately 100%, thus reaching a minimum 356 million credit transfers. Thus, the combined increase in the volume of cross-border credit transfers as well as the reduction in the cost associated with them lead to an estimated welfare gain of 9 968 billion ECU

by businesses and final consumers. The present cost (average of ECU 25.4 for the smallest payments, i.e. 100 ECU credit transfers) is a disincentive to trade, particularly with respect to lower-value and lower-margin intra-EU economic activity, and consequently represents an obstacle to higher employment, particularly in the SMEs segment.

The process of rationalisation of cross-border payment systems might give rise to some redundancies in the payment systems industry, in particular the banking sector. This is however expected to be balanced by the creation of a number of new jobs related to the introduction of new technology, innovative and value-added services in the industry. The risk of redundancies within the payment systems industry will be further attenuated by the consequent increase in the volume of business that enhanced efficiency, and therefore greater transparency, will stimulate (more efficient payment services → widening of intra-EU trade potential → contribution to growth and higher employment → greater and more specialized demand for efficient payment services, etc.).

1.c. Were alternative proposals considered, and with what outcome (e.g. codes of conduct, voluntary arrangements)?

Yes. In 1990, the Commission adopted Recommendation 90/109/EEC[(2)], which contained principles on minimum standards relating to the performance of cross-border credit transfers. In 1991, the Commission worked with representatives of the European Banking Industry, the distributive trades, SMEs and consumers, with a view to finding appropriate voluntary solutions to the problems dealt with in the present directive. Subsequent research (1992, 1993 and 1994) has indicated that on relevant aspects (i.e. those contained in this proposal), insufficient progress has been made.

2. Who will be affected by the proposal?

Which sector of business? What are the size classes and what is the total employment?

The proposal will be applicable to banks and any other institutions which supply credit transfer services to the public by way of business. In practice, the large majority of these will be banks and near-banks. Very few such institutions are in the lower size-classes.

Are there any significant features of the business sector, e.g. dominance by a limited number of large firms?

The main feature of the sector is the lack of integration of payment systems at European level, which is one of the principal causes of the high cost, the inefficiencies and lack of transparency which the current proposal addresses. A contributory element to the lack of investment directed at further integration may be the relatively low volume of

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(2) Recommendation on the transparency of banking conditions relating to cross-border financial transactions (OJ No L 67, 15.3.1990, p. 39).

cross-border credit transfers by comparison with the total volume of domestic credit transfers[3]. However, the high cost, the inefficiencies and the lack of transparency of credit transfer services may in turn be regarded as an obstacle and therefore a contributory cause of these relatively low volumes.

Are there implications for very small businesses, the craft sector or the self-employed?

Very small businesses are very unlikely to be offering credit transfer services to the public. However, as beneficiaries of the proposal, i.e. as users of credit transfer services, they will benefit from the proposal to the extent that they engage in cross-border trade. These remarks apply equally to the craft sector and the self-employed, who will not be in a position to offer credit transfer services, but will be beneficiaries of the proposal as users.

Are there particular geographical areas in the Community where these businesses are located?

No.

3. **What will businesses have to do to comply with the proposal? What will be the compliance costs?**

Compliance costs will mainly relate to the production, or up-grading as appropriate, and printing of information material describing the conditions applicable to cross-border credit transfers (description of the different means available, indication of the cost elements, indication of the time scale for execution of payments, specific warnings with regard to certain means of payment, reference to redress procedures available to users). Institution will also need to review the quality of the systems to ensure that the quality of the services they publicise is effectively matched by the actual quality of service. This review will help institutions to identify and eliminate internal inefficiencies, thus significantly contributing to the progressive lowering of the cost of service production and, consequently, the break-even point by reference to which to decide their charging policy vis-à-vis users.

The cost of this will probably be partially or even wholly offset by the marketing benefits likely to result, as institutions learn to build a competitive advantage on the qualitative standards of the credit transfer services they provide, as a way of attracting new or specialized customers, in particular SMEs.

Are there other administrative procedures or forms to complete?

No.

Are licenses or marketing authorizations required?

No.

Will fees be charged?

No.

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(3) EC Banking Federation, Annual Report, 1992; In 1991, the volume of cross-border payments represented 1,27% of the total volume of all non-cash payments. Cross-border credit transfers accounted for 29,5% (i.e. 117,6 million) of the volume of cross-border payments. However, the value of a cross-border payment is on average significantly higher than the average value of comparable domestic payments.

4. **What economic effects, costs and benefits is the proposal likely to have?**
On employment?

Within the payment systems industry, the net effect is considered to be very limited, if not positive. Within the segment of SMEs, employment benefits are expected to be significant (more efficient payment services → widening of intra-EU trade potential → contribution to growth and higher employment → greater and more specialized demand for efficient payment services, etc.). See para. 1.b.

On investment and the creation or start up of new businesses?

The investment effect will no doubt be positive, as institutions may be expected to take the opportunity to upgrade their services. The welfare gain referred to in para. 1 (in the medium/long-term, at least 10 billion ECU per annum) will release considerable resources for investment and new business creation.

On the competitive position of businesses, both in the Community and third countries' markets?

The efficiency gains and reductions in costs for business within the Community will be extremely positive (See paras. 1 and 4 above). There will be no direct effect on third country business, although positive spill-over effects may be anticipated.

On public authorities for implementation?

Beyond the purely legislative costs of passing the necessary domestic legislation, implementation costs may be negligible depending on the present state of the law in the Member State concerned.

Are there other indirect effects?

Not other than already stated in paras. 1 and 2.

What are the costs and benefits of the proposal?

- **costs:** the cost of compliance for institutions is expected to have no exorbitant effect on the publicity budget, since compliance will mainly involve the production, or up-grading as appropriate, of informative material. As to the necessary review of systems, the scope for cost elimination is expected to outweigh the investment costs that such a review might determine to be necessary.

- **benefits:** in its 1992 working document[4], the Commission indicated that about 50% of the estimated 400 million cross-border payments fell below a 2 500 ECU threshold. On this basis, it underlined the importance of early action to bring the performance of cross-border payment systems up to the standard of the best national systems.

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(4) "Easier cross-border payments: breaking down the barriers": SEC(92) 621 of 27 March 1992.

Taking account of the most important present and prospective elements (gradual completion of the Internal Market programme, move towards full EMU), gross benefits in terms of lower costs for credit transfers have been conservatively estimated, in the medium/long term, at a minimum of 10 billion ECU per annum.

- **balance:** overwhelmingly positive on the benefit side.

5. **Impact on SMEs. Does the proposal contain measures to take account of the specific effect on SMEs - if not, why not? Are reduced or different requirements appropriate?**

Yes. The proposal lays down the possibility for institutions to determine their own performance obligations. The one performance obligation which cannot be contracted out of, i.e. the obligation to refund lost or failed payments, will benefit SMEs to a proportionately larger extent than large businesses, as the value ceiling for payments covered by it is relatively small (10.000 ECU). As might be expected, SMEs have expressed a preference for the removal of this value ceiling. However, the Commission believes that, at the level set, the threshold affords SMEs a reasonably appropriate coverage without having any significant prudential impact on the banking sector.

Could there be higher thresholds which would exclude SMEs without threatening the effect of the regulation?

Not applicable, since the only threshold contained in the present proposal (10.000 ECU) defines the beneficiaries of the directive. Conversely, there is no qualifying threshold defined in terms of size of business. Such would not be appropriate for the reasons already given to the previous question under item 5.

Consultation

6. **Indicate at what stage the consultations were undertaken and the date of publication of the prior notification of an intent to introduce legislation?**

The Commission has, over many years, promoted the fullest consultation of all interested parties and earliest disclosure of its line of policy in this area. This has materialised in the following steps:

- Green Paper[5] (consultation paper) of September 1990, calling for comments from all interested parties; annexed to the Green Paper was a decision to set up two consultative groups;

- setting up of two permanent consultative groups on payment systems in March 1991, with intensive frequency of meetings throughout 1991 and early 1992, leading to reports to the Commission (in February 1992) published in March 1992;

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(5) Discussion paper on "Making payments in the Internal Market", COM(90)447.

- Commission working document of March 1992[6], based on the detailed reports of these consultative groups, announcing the Commission's proposed policy, including intent to introduce legislation if voluntary compliance was not forth-coming;

- communication[7] from Mr Vanni d'Archirafi and Mrs Scrivener to the Commission of December 1993, noting the lack of progress, recording the comments of all interested parties (consumers, SMEs, distribution trade, banks, central banks) on necessary follow-up measures;

- decision of the Commission laid down in this communication to undertake a second (and definitive) detailed monitoring exercise in the second half of 1994 and to introduce legislation if the results were not satisfactory; issuing of a first project for a proposal of a directive, attached to the said communication, to be discussed with all interested parties as well as with government experts, with a view to amending it in readiness for its adoption should this have proved to be necessary, in the light of the second study results.

List of organizations which have been consulted about the proposal and set out in detail their main views, including their concerns and objections to the final proposal. Why is it not possible or desirable to accede their concerns?

European credit sector associations: views range from strongly opposed to reluctant to resigned (some of their detailed technical commentaries have however been acceded to and are taken into account in the current proposal).

Government experts: ad-hoc meetings on the first draft directive. Mixed views, ranging from opposed to enthusiastic. The first draft of a proposal for a directive has been significantly amended to take account to the fullest extent possible of their detailed views.

SMEs: strongly in favour of the principles but preferred self-regulation provided that its effects could have been measured in the short term (which they have not been).

Consumer organizations: widest support to Commission's legislative intervention.

For further details of views, see section III of the Communication from Mr Vanni d'Archirafi and Mrs Scrivener to the Commission of December 1993.

Were the SME Business Organizations formally consulted? If not, why not?

Yes, see immediately above.

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(6) See footnote 4.

(7) "Transparency and performance of cross-border payments"; SEC(93) 1968 of 14 December 1993.

Monitoring and Review

7. **Explain how the effects and compliance costs of the proposal will be monitored reviewed. How will complaints be dealt with? Can the proposal, once it is legislation, be amended easily?**

The proposal contains in its Article 9 an undertaking on the part of the Commission to report on these matters to the European Parliament and Council. The necessary preparation for this will be done by the Commission acting with its existing two consultative groups on payment systems.

There is no comitology procedure, therefore amendments to the proposal, once this is adopted, will require normal legislative procedures.

Contact point

Directorate General XV
Dr. Peter TROBERG
Av. de Cortenberg, 107
B-1040 Brussels

Tel: 295.41.09
295.32.19
295.94.62
296.16.61
Fax: 295.07.50

ANNEX 2

Draft
NOTICE ON THE APPLICATION OF THE EC COMPETITION RULES TO CROSS-BORDER TRANSFER SYSTEMS

Draft

NOTICE ON THE APPLICATION OF THE EC COMPETITION RULES TO CROSS-BORDER CREDIT TRANSFER SYSTEMS

1. Scope

1. This notice sets out the approach the Commission intends to take when assessing the compatibility of cross-border credit transfers systems with the competition rules of the EC Treaty. This document updates and replaces the "Principles on competition for credit transfer systems" contained at Annex C of the Commission Working Document of 27 March 1992[1] .

2. Several instruments can be used to make cross-border payments, including payment cards (charge cards, credit cards, debit cards and, in the near future, pre-paid cards), cheques, and transfers (credit transfers and debit transfers, including direct debiting). Payments can either be made "face-to-face" or remotely. Competition policy is relevant to all types of cross-border payment systems. This notice is, however, limited to credit transfer systems.

3. Although payment systems, including credit transfer systems, also exist within single Member States, this notice is limited to systems in so far as they carry cross-border transfers. Cross-border systems will by their very nature affect trade between Member States.

2. Non-price competition

(1) Membership in a system

4. The question of membership in payment systems has to take into account aspects of Community law other than the competition rules. In particular, where systems are set up by legislation or guided by public authorities, the principles of freedom of establishment and freedom to provide services contained in the EC Treaty and in the Second Banking Directive[2] will be applicable. Those aspects of public regulation are not dealt with in this document.

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(1) SEC(92)621 "Easier cross-border payments: Breaking down the barriers".

(2) Second Council Directive of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (89/646/EEC), 1989 OJ L386/1.

5. Private arrangements between banks setting up new or linking existing systems will have to comply with Articles 85 and 86 of the EC Treaty.

6. As a general rule, a system which constitutes an "essential facility" should be open for further membership (provided that candidates meet appropriate criteria) and must not prevent individual members from taking part in other systems. Factors indicating that a system might be an essential facility include a high market share or a significant number of participants. A system that does not have a significant position on the overall market may be important for particular types of banks and could also constitute an essential facility for the types of bank in question.

7. A payment system that constitutes an essential facility may apply membership criteria that are objectively justified. Criteria should be written and accessible. They can concern, for example, the financial standing, orderly management and technical capacities of participants.

8. As regards criteria based on volume, it will be legitimate to require that the expected traffic generated by a candidate should not be negligible. But payment systems should wherever possible permit participation by banks of varying sizes. Thus, instead of basing a membership criterion simply on expected volume, it may often be preferable to make the candidate's own decision depend on economic considerations (for example, a high flat rate contribution representing the participation in previous investments by other participants; however the share of the entrant must not exceed a fair share of the actual cost of past investments). Where foreign banks apply for membership in a domestic transfer system, their expected volume may be low in the beginning; in such cases the type of business, the experience and the volume of payment transactions in the country of origin of such banks should be taken into account.

9. Refusal of membership or exclusion should be subject to an independent review procedure.

10. Members of a system which is not an essential facility (see paragraph) are not obliged to open their system to further members and may be capable of obtaining an exemption under Article 85(3) if they prevent, in order to ensure adequate volume, individual members from taking part in other systems.

(2) Operation of a system

11. Banks within a system can agree standards relating to the operation of the system, the kind and quality of transactions to be processed by the system, and security and risk management rules. However, such agreements:

(1) must be limited to inter-bank relations and must not lead to concerted practices vis-à-vis customers; and

(2) must not lead to any exclusivity arrangement: customers must remain free to change banking connections from one institution to another, or to bank with several institutions simultaneously.

12. Agreements on standards could include the following:

(1) agreements on operational standards, including:

- standardized message formats and routing identifiers (but agreements on eligible hardware should be avoided);

- rules on transaction times, for example stipulating that value will be received by the beneficiary bank of a credit transfer by a certain deadline if a payment order is received by a certain time (but such arrangements must, in particular, not lead to concerted value dating practices vis-à-vis customers);

- settlement arrangements, for example the modalities of how settlement is to be achieved, of agreeing settlement totals, and of agreeing the point at which settlement can be considered final.

(2) where justified, agreements on transaction standards, including:

- maximum and minimum amounts to be processed by a system;

- the minimum information necessary for a transfer to be sent through the system.

(3) agreements on security and risk management rules, including:

- criteria for the granting of settlement status and the management of settlement accounts;

- arrangements relating to liquidity standards (for example, a requirement to post sufficient collateral to cover exposures);

- prearranged sharing of losses from defaults of participants.

3. Price competition

(1) Pricing vis-à-vis customers

13. Here, s in other areas of banking competition, no agreements between participating banks on prices of transactions with their customers can be accepted. Any agreements affecting inter-bank relations must leave banks free to determine the offers which they can make and conditions they will apply their customers.

(2) Costs of systems and central bodies

14. The costs incurred by the setting up of a system and those arising out of the operation of a central body (for example, an ACH[3]), can be shared amongst participating banks by means of, for example, an ACH tariff (which might vary according to volumes or other pre-established conditions) charged to participating banks. If setting up costs have been necessarily incurred by beneficiaries' banks, it might be justifiable to pay for those costs by means of a collectively agreed interchange fee (as to which, see below).

(3) Interchange fees in multilateral systems

(a) Indispensability

15. The remainder of this notice deals with collectively agreed interbank transaction fees (multilateral interchange fees). As the Commission stated in its decision in the *Dutch Banks* case, the position of the Commission is that only in exceptional cases, where agreements on multilateral interchange fees are shown to be actually necessary for the successful implementation of certain forms of cooperation, positive in themselves, between a number of banks, may agreements on interchange fees be capable of obtaining an exemption under Article 85(3)[4]. It is not for the Commission to impose any particular arrangements on banks. Where, however, banks introduce interchange fee arrangements, the Commission (in applying the criteria set out in Article 85(3) for obtaining an exemption) will need to examine the economic benefit which these arrangements seek to achieve and consider whether consumers will receive a fair share of the resulting benefit and whether the particular interchange fee arrangements are actually necessary as a means to achieve that benefit.

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(3) Automated Clearing House: a national payments clearing body.

(4) Decision of 19 July 1989, Dutch Banks, OJ 1989 L253/1, at paragraph 26.

(b) Double charging

16. "Double charging" occurs when the sender of a cross-border transfer requests to pay all the charges of the transfer (a so-called "OUR" transfer[5]), but nevertheless either an intermediary bank or the beneficiary's bank makes a deduction from the amount transferred or the beneficiary's bank makes a charge to the beneficiary over and above the charge that would be made for a domestic transfer.

17. The Commission considers that the possibility for customers to make OUR transfers is beneficial. In certain circumstances, agreements on multilateral interchange fees may be necessary in order to avoid the practice of double charging cross-border transfers thus enabling banks to offer OUR transfers. If interchange fee arrangements were accepted for OUR transfers, that does not imply that banks should impose OUR payments on their customers[6].

(c) Costs for cross-border transfers

18. To carry out a cross-border transfer may require extra tasks as compared to a domestic transfer:

((1) In relation to the system as a whole, a new system may need to be started up, or an existing system modified, to process cross-border transfers.

(2) In relation to the transfer itself:

(i) a cross-border transfer may need to be reported to the balance of payments authorities as an incoming payment[7];
(ii) the payment may need to be converted into the currency of the beneficiary;
(iii) the beneficiary may require more information (for example, details relating to the payment order) than is normally given for domestic payments;
(iv) the details of the beneficiary, their account number and the bank sort code need to be verified since this information is often incomplete or incorrect;
(v) the payment order needs to be reformatted if it is to be processed by the clearing circuit in the destination country.

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(5) Transfers can be described as "OUR", "SHARE" or "BEN" depending on how the charges are allocated:
- OUR: all charges to sender (our charges);
- SHARE: share costs between sender and beneficiary;
- BEN: all charges to the beneficiary.

(6) This is without prejudice to the outcome of coordination proposals which the Commission is making which if adopted would make OUR transfers the default solution where nothing has been specified by the sender of the transfer.

(7) These statistical reporting requirements vary as between the Member States. The Commission is actively pursuing an exemption from all reporting requirements for all intra-Union payments below ECU 10 000.

19. In an ideal situation (where making cross-border payments would be assimilated to making domestic payments) these extra tasks would no longer be needed. In such a situation, which will not occur for some time to come, the costs for receiving transfers from abroad should not be higher than those for receiving domestic transfers, the problem of double charging should not arise, and multilateral interchange fees would not seem necessary.

(d) Avoiding double charging where cross-border transfers give rise to specific costs

20. In the absence of this ideal situation there will be extra tasks required to make cross-border transfers (paragraph above). Whenever the sending bank or a correspondent bank or ACH are able to carry out those extra tasks, the transfer could be entered into the domestic clearing circuit of the destination country as if it were a domestic transfer. This means that there would for the beneficiary's bank be no difference between receiving a transfer that has originated in another country and receiving a purely domestic transfer[8].

In such a situation, the problem of double charging should not arise, and multilateral interchange fees would not seem necessary. This is one way in which extra tasks can be carried out without the need for multilateral interchange fees.

21. Nevertheless, the Commission recognizes that there may continue to be circumstances where a beneficiary's bank will necessarily continue to face additional costs for the receipt of a cross-border transfer as compared to a domestic transfer. In particular, that will be the case in those Member States which require that the beneficiary's bank report an incoming payment to the balance of payments authorities, or which require that beneficiaries receive more information from their bank than is normally given for domestic payments. That will also be the case where beneficiaries' banks have incurred the costs of setting up new systems (and here again the position will vary as between the different Member States). In such circumstances it may be justifiable for banks in the destination country to agree a multilateral interchange fee, to cover those additional costs, in order to avoid double-charging. Such an interchange fee might be agreed between participants in an ACH, or generally between all or most banks of a particular country.

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(8) Once a payment (of whatever origin) has been fed into a domestic clearing system, and is thus necessarily indistinguishable from a domestic payment, it should be treated as a domestic payment, also as far as costs and prices are concerned.

22. An arrangement between participants in an ACH would cover the necessary extra costs of beneficiary's banks by means of an interchange fee agreed between the ACH and the participating beneficiary's banks. This multilaterally agreed interchange fee would be based on the actual extra costs of the beneficiary's banks, and could be included in the overall (bilateral) fee charged by the ACH to sending banks (or sending ACHs). The ACH would remunerate beneficiary's banks for their necessary extra costs by redistributing to them the interchange fee.

23. An arrangement between all or most banks of a particular country would again cover the necessary extra costs of beneficiary's banks by means of an interchange fee agreed between all participating beneficiary's banks. For any particular transfer, one of those banks would be acting as the correspondent (entry point) bank for the sending bank. Again, any multilaterally agreed interchange fee would be based on the actual extra costs of the beneficiary's banks, and could be included in the overall (bilateral) fee charged by correspondent banks to sending banks (or sending ACHs). The correspondent bank would remunerate beneficiary's banks for their necessary extra costs by redistributing to them the interchange fee.

24. Where multilateral interchange fees can be justified as being necessary to avoid double charging, they should meet the following conditions:

(1) the levels of any such fees should be set by reference to the actual additional costs incurred by beneficiary's banks, which presupposes perfect transparency in respect of these fees;

(2) the fees should be defined as maxima. Members of a system with maximum interchange fees must be permitted, but are not obliged, to negotiate fees below the maximum, for example through bilateral rebates between participants.