Association of Corporate Treasurers (ACT) comments on the draft Payments Directive Com(2005) 603 Final Dated 1.12.2005

The Association of Corporate Treasurers (ACT)

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The ACT has 1,500 students in more than 40 countries. Its examinations are recognised by both practitioners and bankers as the global standard setters for treasury education and it is the leading provider of professional treasury education. The ACT promotes study and best practice in finance and treasury management. It represents the interests of non-financial sector corporations in financial markets to governments, regulators, standards setters and trade bodies.

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General

Taken as a whole the ACT very much welcome the Directive and its objective of harmonising the legal framework for payments in Europe. Its coverage is good and successfully manages to identify the sorts of topics that need to be included so as to facilitate the development of the actual payments systems and processes by the commercial sector.

From the corporate user's point of view clarity on pricing and terms and conditions is important, as is certainty about time cycles and value dating for transfers. Both these aspects are reasonably well covered EXCEPT that Titles III and IV do not apply to transactions over EUR50,000 which creates a thoroughly confusing picture. If there are benefits in clarity and harmonisation of processes then there should be no reason why larger transactions should not benefit from this. However we accept that to the extent that liability is involved this could be treated differently for the larger transactions.

There are numerous points of clarification or drafting points, but there are certain key points which very definitely need to be addressed and which are potentially contentious since the customer view may well differ from the banks' and PSP's view.

Key points:

- Over liability for unauthorised transactions (Art 49 and 50) where there is a carve out so that companies do not benefit from the rule that the PSPs bear the liability. Strangely Article 48 does still apply for corporates and in it it says that use of a payment verification instrument of itself is not sufficient to establish that the payment was properly authorised which does give some protection to corporates, but is not conclusive. A possibility would be to argue that there should be no carve out for corporates from 49 and 50, so that corporates do benefit from all their provisions, but that in respect of 48,49 and 50 PSPs and their corporate customers may agree different rules

- The general rules in Titles III and IV only apply to payments under EUR 50,000. We believe this should be massively higher or no limit at all. However to persuade the PSPs to agree to this we accept that the rule in Art 50 that the customer is only liable up to EUR 150 would need to be changed so that it was not applicable to corporates or at least much raised, or that in Article 50 there was a limit of EUR50,000.

- We need to be absolutely sure that transactions within a group are not treated as payment transactions triggering corporates to need to become a Payment Institutions and subject to regulatory requirements

- We would appreciate clarification that corporates or institutions that are not PIs can benefit from direct access to ACHs (cf Article 23) as is the case at present with corporates and Bureau operating with BACs in the UK

- Articles 28 and 36 appear to be trying to ensure that certain information is transmitted with the payment sufficient to identify the payment, but is is not clear whether this is merely a PSP sequential numbering or a more useful customer supplied reference like an invoice number or remittance indentifier. It is essential that the customer specified information is carried to allow automated reconciliations and STP (Straight Through Processing).

- Certain timecycles are given for refunds and refusals in particular circumstances. We wonder if this directive provides an opportunity to set more definitive rules about finality on a payment so that payers and payees know exactly where they stand and at what point in time they can be sure a transaction will not be altered.

On the positive side there are lots of good things like removing deductions for charges which will greatly help ease of STP and automated reconciliations, and banning float period and value dating as a way of charging will help to improve the predictability over transactions, save of course that as drafted larger payments will not have this benefit.

Detailed comments on the draft Payments Directive of 1.12.2005

Recital 6:
The intent is that the directive should only cover those whose main business is the provision of payments services which is quite correct. However it is important that group companies providing a similar service for members of their group and related joint ventures are not inadvertently caught by the need to be licenced. Group exclusion is needed at Art 3.

Recital 9:
Given the light regulation of Payment Institutions it is good that client funds must be kept separate.

Recital 12:
This covers the need for payment providers to have open access to other systems. This is a valid and important provision to include but we need to clarify what sorts of conditions are regarded as non discriminatory, in that it is perfectly in order for payment systems to have certain rules about use and membership (cf Art 23)

Recital 16:
Intent is good in that sufficient information is intended to be sent with the payment, however we remain unsure if this is sufficiently clearly stated in the actual articles (cf Art 28 and 36)

Recital 22
Risk allocation on unauthorised payments does not apply to enterprises.See comments on Articles 49 and 50.

Recital 30:
Note that Strict Liability applies to the PSPs, and we support this.

Title I: Subject matter, scope and definitions

Article 2, Scope:
Titles III and IV do not apply to payments over Euro 50,000. This limit should be removed completely or at the very least substantially increased. Introducing a two tier set of rules will not help to clarify and harmonise the payments industry across Europe. It would leave one segment of the market not benefiting from all the attributes mentioned at the start of the Directive like rationalisation, increased choice and protection, improved efficiency, faster and more economic end to end automatable payments etc. It is not valid to say that large payments need not be catered for since they are made by large organisatons that can negotiate their own deals. Many organisations with minimal negotiating power will be paying bills of EUR 50,000 or more, and even the larger organisations are only able to negotiate with their own PSPs and not with the PSP at the far end of a transaction.

This limit applies for Reg 2560 purposes but that was more a practicality of introducing uniform charging little by little. If there is any logic for uniform rules and responsibilities then there should be no limit as to their applicability. Saying that larger payers are better placed to negotiate their own terms does not apply to this circumstance. This is more related to having a uniform infrastructure available, and uniform procedures for processing transactions.

The PSPs requested that this limit be included because in Article 50 they end up bearing all losses over EUR150 on unauthorised transactions. If they have unlimited loss potential they very reasonably want a limit to the size of transactions. The solution is to remove the EUR 50,000 limit here and instead reinstate it specifically as a maximum liability in Art 50

If providers want to charge more for large payments then that is a commercial matter.

Article 3 (g) Negative scope
Payments within a group should be excluded here (cf Recital 6)

Article 4 Definitions
Generally these are not sufficiently clear and some items are defined within the body of the directive rather than all together here. Eg point of Acceptance is defined in Art 54, Strict Liability is not defined, nor is working day in Art 60.
(5)Final recipient should be clarified. For example a parent company may receive funds on behalf of a subsidiary and will be passing them on via inter-company a/c. Does the definition really mean final recipient within the banking chain?

(7)Refers to an account 'used exclusively' for payment transactions. All entries on an account will represent some sort of payment so is the intention to distinguish savings account? If so terminology such as demand account could be used.

Article 13
This requires the PSP to keep records for no more than 5 years and Article 44 says at least one year. Why cover in 2 places? Also, how does this tie in with record keeping for financial records generally. This used to be different across member states eg UK is 7 years, longer in Belgium etc

Title II Payment Service Providers

We note that the form of regulation and supervision of payment institutions is relatively light touch. While the risks on a PSP are lower than on a deposit taker we believe that it should be possible to find an appropriate and proportionate degree of regulatory supervision to be imposed, as explained in Recital 9. Article 10.2 requires user's funds to be kept separate which is a good protection, although we wonder how that will be checked.

While saying that the level of risks is low there is the circumstance when a direct debit payer demands a refund from the payee's payment service provider which is obliged to refund the money even if it is unable to reclaim the money from the payee. The Service user will therefore need a fair degree of solvency to be able to weather this sort of event. Likewise there is a significant operational and systematic risk eg making sure payments are executed on the value date once accepted.

Article 23
Reasonable open access to payment systems is a good provision, but we wonder if the way it is drafted is to an extent too wide. Would it for instance catch some sort of internal group system for settling inter-company accounts, or cash pooling? On the other hand we believe that it is right to give corporates a direct access right into various ACHs and indeed to SWIFT, subject to them being able to comply with reasonable operational rules imposed. Given that this Article is in the section on Payment Institutions it could be interpreted as applying only to PIs, not corporates in general. We believe that it is important in the interests of efficiency for corporates and Bureaux to be able to have direct access to ACHs as is the case with BACs in the UK.

There is wider question as to whether this article is strictly needed given that some of the issues would probably be covered by EU Competition Law?

Title III: Transparency of conditions for payment services

Article 28:
(a) is not sufficiently clear that it refers to the payers's own specified information that he wishes to be transmitted with the payment, such as invoice numbers or remittance identifier. As drafted the reference of the payer could mean an identification number / name of the payer and the information to identify the payment could be a PSP's sequential payment number which identifies the transaction but not the reason for the payment.

Article 31.1 last para
If a PSP charges £100 per month service charge it could be very difficult to isolate the make up of this as between fees for cheques, fees for routine transfers, fees for opening accounts etc

Article 32
This requires the service provider to provide reporting of transactions. This is good but triggers the thought as to whether this Directive should do away with the various sorts of central bank reporting obligations on cross border payments that is required in some countries. Fees are usually charged for the costs of central PSP reporting, even for cross border transfers executed with the same PSP at each end. This means that if reporting is to continue it does provide a mechanism for PSPs to levy excessive fees notwithstanding Reg 2560. The current limit above which reporting is required is EUR12,500 and this

does not increase in line with the increase to EUR50,000 in Reg 2560 that applied since 1 January 2006. The reporting threshold of EUR12,500 is relatively low and as the potential to catch consumers as well as corporates.

Article 36.1(a)
Same point as in Article 28 re sufficiency of information to explain the payment.

Title IV: Rights and obligations in relation to the provision and use of payment services

Article 43.2
Blocking of a payment authorisation instrument may only happen after a bona fide effort to contact the users. This is unrealistic and as soon as there is a genuine suspicion further payments should be stopped. Also there is a possible conflict here with anti money laundering legislation where tipping off is an offence.

Article 49 and 50 re Liability for unauthorised payments
These two articles are drafted so that they DO NOT apply to corporates (except for very small ones). These clauses seem to have become divorced from the principle that the party at fault should carry the liability. If a PSP makes a wrong payment because of its own mistake or inadequate security features it should be responsible

If the corporate has been negligent in establishing its own procedures to prevent fraud then it should be responsible for any misuse eg of passwords etc

Article 50 covers the maximum loss the user can bear and this numeric amount could perhaps be set at Euro 150 but with the right of parties to vary it by agreement. Art 50.3 should always apply so that the payer does not bear any loss after reporting any stolen verifications instrument. Art 50.4 is s very practical and sensible provision.

Perhaps the solution to the inevitable arguments over liability is to have the clauses as drafted apply to all enterprises but then to allow a variation by agreement.

It is worth noting the precedents in the US under UCC (Uniform Commercial Code) 4A, for example the PSP is obliged to provide reasonable security systems in place (ie payment verification instruments). If a loss results from an unauthorized payment order, the customer suffers the loss if the bank accepted the order in good faith, and complied with a commercially reasonable security procedure to verify the authenticity of the order. The customer can shift the loss to the bank if the customer shows that its organisation did not cause the loss. If the loss falls upon the bank, the bank refunds any payment received from the customer and, if applicable, interest on the refundable amount. There is no liability for consequential loss.

Article 52: Refunds
This article provides that direct debits may be revoked by the payer in certain circumstances, with a four week time limit specified in Article 53.1. We are not sure that the circumstances when refunds are allowed are sufficiently clear to cater for completely unauthorised payments, eg when the payee has failed to supply any goods or materials or where a standing authorisation has been revoked prior to the payment request being processed. For unauthorised payments we suggest a longer refund period of say one year.

Article 53.1
We note that the refund period of four weeks runs from the time the payer is informed of the payment transaction. This leaves the payer uncertain as to how long the period for potential refunds will actually be, however we accept this degree of uncertainty is inevitable to protect the payer's interests.

Article 53.2 and 53.3
These are excellent provisions and to be greatly welcomed, namely no charges on refunds and the ability for companies to agree different refund periods. However it is not sufficient to agree refund periods with the service provider since on Direct Debits the payer will also need to agree and must include this in his payment mandates.

Article 54 Point of acceptance
The definition here is not sufficiently clear, for example it does not fit well with instructions delivered to a PSP to make a payment with a forward date. Conditions i), ii) and iii) will probably happen as soon as the PSP receives the instructions and logs them into its systems. However the timescales for payments/ refusals etc starts to tick from the point of acceptance eg Art 55, Art 56, Art 60. Under Article 60 the PSP may be obliged to make a payment on the day after acceptance even if the payer has requested a forward payment date! Where is the point of acceptance for a direct debit?

Is this vagueness deliberate since in Art 26.1 (b) the PSPs must explain to their customers what they treat as the time of acceptance?

Article 56
Payments may not be revoked after the time of acceptance. In the case of direct debits this will be the time of acceptance by the payee's PSP. However in the UK BACs files may be submitted with forward payment value dates and current practice is that revocations are possible until the 3 day processing starts. Care will be needed so that the definitions of acceptance that the PSPs use will not inadvertently prevent revocations prior to processing.

Article 57: Fees
A valuable provision here that payee and payer bear own fees

Article 58
Another good provision which ensures that the amount of a transfer is transferred intact with no deductions. This is essential if automation is to be achieved. However as drafted

it only says that the payer's PSP should not deduct fees. There is an exception so that the payee PSP may do so by explicit agreement but nowhere is there the initial prohibition that would require the exception! (cf Recital 25)

Article 58.2
Any estimate for deductions presumably applies to deductions at the far end since the deductions at the near end must be known with certainty? Overall this is a useful provision but not strictly necessary?

Article 60
The term 'end of the first working day' is used but requires a tighter definition.

The D+1 time cycle for payments is a welcome improvement on the normal D+2 in the UK. However the Directive applies to all payments in Europe irrespective of currency. The Directive should cover all European Currencies and possibly the USD but does it really need to cover the movement of, say, South African Rand between two Rand accounts? While including less common currencies might give an improved service that will benefit customers we doubt if that is really the intent of the Directive, nor whether it is really practical.

We note too that the time periods run from the time of acceptance. Care will again be needed with the definition of acceptance so that payments input with forward value dates are not upset by this.

Article 61
Note that there is no transition period on Direct Debits but rather they must go to D+1 straight away. This is strange and one might expect it to be symmetric with credit transfers

Article 62
Timescales for payment still apply when the payee does not have an account with the PSP. Is this just stating the obvious that the payee does not have to bank with the payer's PSP, or is it wider covering payments to a customer with no bank account? Does it have to be delivered in cash then?

Article 63
Cash deposits must be credited the next working day. It is not obvious why this is included in a Directive covering electronic payments, and we question if this is really workable. Eg what if $ are paid in in England for credit to a Euro a/c in Germany.

Article 64: National payment transactions
This permits national systems to have shorter maximum execution times. This is not helpful for the objective of SEPA becoming universal and used for both domestic and cross border payments. However the alternative view is that is domestic systems can provide a better service than SEPA it will put competitive pressure on SEPA. It is therefore acceptable to leave this Article unchanged.

Article 65
This article is aiming to ban value dating as a method of charging, which is an excellent provision and will encourage transparency of charging. However this article does not reflect the tone of Recital 29 which refers to banning the use of value dating to the disadvantage of the user. There can be occasions where a payer will want to make a back valued payment, eg a bank correcting a mistake, or an employer paying wages where the calculation of hours worked mean that the amount can only be determined at a later stage which may be later than the contractual obligation to pay (Apparently this happens in Italy where you must be paid by the end of the relevant month).

The concept of availability here could mean a PSP allows a customer to draw on funds which are subsequently recalled, throwing the customer into overdraft. The PSPs may query this.

Article 66
This envisages payments being made by reference to a unique identifier or bank account number, which we accept. Likewise the ACT accepts that the unique identifier should take precedence over the name of payee. However this rule on the account number taking precedence only applies if an IBAN is used, which does not help us in the UK since the IBAN is not actually used in our domestic systems.

Title VI: Final provisions

Article 85
A deadline is set for the transposition into law of this directive, but it still leaves open the possibility that the effective start dates will differ in different Member States. Given that this Directive is by definition covering transactions between Member States it would be more effective and avoid confusion if its provisions could start simultaneously in all Member States

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