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VERBAND DEUTSCHER PFANDBRIEFBANKEN E.V. BERLIN

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Comments on the CESR/CEPS/CEIOPS consultation paper of 26 March 2008 "Common understanding of the obligations imposed by European Regulation 1781/2006 on the information on the payer accompanying funds transfers to payment service providers of payees"

1 General comments

We welcome the opportunity to take part in the consultation and comment on the proposed common understanding.

1.1 Common interpretation of the Regulation

The intention of CESR/CEPS/CEIOPS to establish a common interpretation of the rules in Regulation 1781/2006 is warmly welcomed. Though the Regulation is directly applicable in all EU member states, it has become clear that the understanding and implementation of its provisions vary from one country to another. The consultation paper could help to ensure that implementation is standardised. It is highly important, particularly for banks operating across the EU, that financial services regulators in all member states interpret the Regulation in the same way.

1.2 Too little emphasis on sending side

The paper concentrates on the side receiving payments. As a result, it is not made sufficiently clear that the payer bank alone can ensure that the information on the payer is complete. Only if this bank invariably sends complete information about the payer can the international requirements of FATF Special Recommendation VII be fulfilled and efficient payments processing be ensured.

It should therefore be clearly spelled out that the sole responsibility for providing complete information about the payer rests with the payer bank. There is also a need to clarify what steps should be taken by the responsible authorities – including those in third states – against banks which do not comply with the international rules and are reported to the

authorities pursuant to Article 9(2). The solution cannot be to impose yet more requirements on the banks at the end of the payment chain when the cause lies with the sending bank.

1.3 De minimis threshold

Greater account should be taken of the EUR/USD1,000 de minimis threshold mentioned in recital 17 of the Regulation. The competent authorities should publish a list of the countries which apply this threshold to outgoing payments. In addition, it should be made clear that incoming payments from these countries below the de minimis threshold are not subject to detection of missing information (see also our comments below in 2.7).

1.4 Status of the paper

It should be explained what status the paper will have at the end of the consultation phase. Will it contain guidelines which are binding on supervisors and payment service providers or will it be non-binding implementation advice?

1.5 Use of terms

The terms "complete", "missing" and "incomplete" should be strictly distinguished from one another and used accordingly.

2 Detailed comments

2.1 Introduction – paragraph 2

We welcome the explicit acknowledgement that this is a mass payments business and that shortcomings continue to exist concerning the completeness of information accompanying payments from outside the EU. Regrettably, however, the paper does not propose any measures for remedying these shortcomings by targeting the responsible payment service providers through initiatives by the Financial Action Task Force, for instance. Imposing requirements on the payee bank alone is not an adequate response.

2.2 Common understanding on Article 8 of the Regulation – paragraphs 4 to 8

Our understanding of paragraphs 4 to 8 is that the payee bank should proceed in two steps as follows:

1. It should first check that all incoming payments are complete as required by the conventions of the messaging or payment and settlement system which has been used.
2. This should be followed by post-event random sampling using a risk-based approach.

We welcome this interpretation, which takes account of the practicalities of efficient payments processing.

It needs to be clarified in paragraph 7 whether the expression "*Further* PSPs …" is used in the sense of "additional/more PSPs …" or "furthermore, PSPs …".

2.3 Procedure if payer information is found to be incomplete – section 3.1

The term "payee PSP" should be used instead of merely "PSP" throughout this section.

Paragraph 13: Under Section 676g of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), the payee bank is required to credit the incoming transfer to the payee if the payee can be identified. Only if an embargo notice has been issued may the payment be "parked" since this takes precedence over the civil requirement to effect payment. Banks in Germany – and probably in other EU member states as well – are therefore unable to choose whether to reject, execute or hold a transfer accompanied by incomplete information. They are not in a position to exercise the options set out in paragraph 13 and in section 3.1.2 (paragraphs 16 to 18). What is more, the Directive on Payment Services in the Internal Market, which has to be transposed into national law by November 2009, will require all banks in the European Union to credit the amount, at least where payments within the EU are concerned. In the interests of the entire European economy in a smoothly functioning payments system, this conflict of rules should be reflected in the common understanding.

Paragraph 21: As we understand it, this paragraph permits banks to collect queries and then send the payer bank a package of requests for complete information. Allowing such a procedure will make it considerably easier for banks to process their requests. To achieve a tangible improvement, however, consideration should be given to extending the maxi-

mum collection period from seven to twenty days. Otherwise, there will be too few transfers per transferring bank necessitating a request for further information. In addition, it should be clarified what is meant in the first sentence by "on which occurrence".

Paragraph 23: The anti-money laundering officer can be involved if there are grounds for suspicion. These are not, however, constituted merely by the fact that a payment is accompanied by incomplete payer data or that the payer bank has not responded to a request for further information. Broadening the obligations of the payee bank in this way would not only go beyond the requirements of the EU Regulation. It would also infer a conscious unwillingness to cooperate on the part of payer banks which send transfers with incomplete information. The common understanding should not be based on such conjecture. The requirement to try and trace payer information should be kept completely separate from the assessment of the suspicious character of incoming payments from a money-laundering perspective.

Paragraph 25: We support this view.

2.4 Question 1 (paragraphs 26 and 27)

We prefer option B. The more extensive obligations which option A would impose on the payee bank would go beyond the requirements set out in the Regulation and therefore cannot form part of an interpretation of these requirements. On top of this, there is little chance of a reminder succeeding if the original request has been ignored. The additional time and effort involved should be avoided.

The following modification to option B could also be considered. This would give banks appropriate room for manoeuvre: The payee bank keeps a record of its request and of the reply or lack of reply from the payer bank and, if necessary, makes this record available to the competent authority for further action.

2.5 Question 2 (paragraphs 35 to 37)

As explained in our comments on paragraph 13, banks in Germany do not have the option of holding a payment and nor – at least where payments within the EU are concerned – will any other bank in the European Union when the Payment Services Directive comes into force in November 2009. Otherwise, please see our reply to question 1.

2.6 Section 3.2 (paragraph 38)

The procedure described in subparagraph a is incompatible with common banking practices (please see our comments on paragraph 23).

2.7 Question 3 (paragraph 41)

These criteria can only serve as a means of assistance for the banks. They should not be considered exhaustive so that banks can retain the discretionary leeway they need to determine what constitutes "regularly". A criterion taking account of the EUR/USD1,000 de minimis threshold mentioned in recital 17 of the Regulation needs to be added. If it is known that payments of less than EUR/USD1,000 from certain third countries (e.g. the USA) are not normally accompanied by payer information because this is not a legal requirement there, it will be pointless to request the information from banks in these third countries.

2.8 Section 4.3

Paragraph 44: We agree with the proposed procedure. A strict distinction should be made between a report to the competent authority under Article 9(2) of the Regulation and a suspicious transaction report. A standard method of communication and a standard messaging format need to be agreed on with the competent authorities.

It is regrettable that the paper leaves open how competent authorities will deal with reports received under Article 9(2). The point is not simply to verify that reports are duly submitted. A report is not an end in itself but must trigger action of some kind by the competent authorities.

2.9 Question 4 (section 4.4, paragraphs 45 to 47)

The Regulation consciously leaves it entirely up to the payee bank to decide how to deal with banks that repeatedly fail to provide payer information. This prerogative should not be removed or restricted by a coordinated external mechanism.

In addition, the question arises as to whether a coordinated procedure might infringe antitrust law and be considered an agreement to boycott certain banks. We do not think it is appropriate for European banks to have to enforce implementation of the FATF Special

Recommendation VII vis-à-vis banks that fail to follow the Recommendation. It is instead up to the competent authorities and national governments to take any necessary action against failure to implement the FATF Special Recommendation. We therefore advocate deleting paragraph 47.

2.10 Section 6 (paragraph 51) – De minimis threshold

The EUR/USD1,000 de minimis threshold should not be mentioned only at the end of the paper but should be taken into account when discussing the banks' obligations to take action, especially under Article 9 of the Regulation. There are a number of uncertainties on this issue concerning how the Regulation should be implemented. The objective should be to find a pragmatic solution for cases where it is known that a de minimis threshold exists in the country of the payer bank and that payments below the threshold will normally not be accompanied by complete data about the payer.

2.11 Section 7

The review of the common understanding should be conducted at the same time as the review of the Regulation.

2.12 Question 5 (Annex 1)

We do not consider it useful to include this description of sample practices employed by randomly selected categories of banks. The impression might unintentionally arise that these are practices whose implementation is mandatory. We therefore recommend deleting the annex.