REPORT

on the Communication from the Commission to the European Parliament, the Council, the European Monetary Institute and the Economic and Social Committee 'Boosting Consumers’ Confidence in Electronic Means of Payment in the Single Market’ (COM(97)0353 - C4-0486/97)

Committee on Legal Affairs and Citizens’ Rights

Rapporteur: Mrs Astrid Thors
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By letter of 4 August 1997 the Commission forwarded to Parliament its Communication 'Boosting Consumers’ Confidence in Electronic Means of Payment in the Single Market'.

At the sitting of 2 October 1997 the President of Parliament announced that he had referred this Communication 'Boosting Consumers’ Confidence in Electronic Means of Payment in the Single Market' to Committee on Legal Affairs and Citizens’ Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and to the Committee on the Environment, Public Health and Consumer Protection for their opinions.

At its meeting of 22 - 24 September 1997 the Committee on Legal Affairs and Citizens’ Rights appointed Mrs Thors rapporteur.

It considered the Commissions’ communication and the draft report at its meetings of 5 - 6 and from 21 - 22 January 1998.

At the latter meeting it adopted the resolution unanimously.

The following were present for the vote: De Clercq, chairman; Palacio Vallelersundi, vice-chairman; Rothley, vice-chairman; Malangré, vice-chairman; Thors, rapporteur; Anastassopoulos, Añoveros Trias de Bes, Barzanti, Cassidy, Falconer, Florio, Gebhardt, Martin D., Nassauer, Verde I Aldea and Wijsenbeek.

The Committee on Economic and Monetary Affairs and Industrial Policy decided on 4 November 1997 and the Committee on the Environment, Public Health and Consumer Protection decided on 8 October 1997 not to draw up opinions.

The report was tabled on 27 January 1998.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.
Resolution on the Communication from the Commission to the European Parliament, the Council, the European Monetary Institute and the Economic and Social Committee 'Boosting Consumers’ Confidence in Electronic Means of Payment in the Single Market' (COM(97)0353 - C4-0486/97)

The European Parliament,

- having regard to the Communication from the Commission to the European Parliament, the Council, the European Monetary Institute and the Economic and Social Committee 'Boosting Consumers’ Confidence in Electronic Means of Payment in the Single Market’ (COM(97)0353 - C4-0486/97),

- having regard to 'Commission Recommendation of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder (97/489/EC)'(1) attached to the afore-mentioned Communication,

- having regard to the report of the Committee on Legal Affairs and Citizens’ Rights (A4-0028/98),

A. whereas the main problems associated with the use of electronic means of payment are

   - lacking availability of comprehensive customer information on payment instruments and on effective redress procedures,
   - liabilities arising in case of loss or theft and
   - the burden of proof in such situations,
   - protection for the consumer in case of bankruptcy of a bank or other partner to an electronic transaction,

B. whereas technical progress in the field of electronic commerce and electronic means of payment is taking place at an increasingly fast pace, and therefore it is also necessary to be cautious not to introduce legislation that will not work in practice or make payment systems too heavy to administer,

C. whereas these technological developments, the forthcoming Single Currency, increasingly intertwined national economies and highly demanding consumer attitudes will lead to a continuous rise in the market share of electronic commerce and payment,

D. whereas the intrinsically cross-border nature of this trend entails a need for equal conditions of competition in the Common Market and ultimately on a world-wide scale,

whereas security standards and liability arrangements are an essential element of these equal conditions of competition, but also for increasing consumers’ confidence,

whereas there is in the future a need to have a more thorough reflection on the differences and similarities between the instruments described in the communication on the one hand, and on the other hand between payment cards and normal bills issued by national banks,

whereas in this context the question of who can be issuer of electronic money products should be clarified,

1. is of the opinion that a draft directive on electronic payment instruments as well as money transactions effected in connection with the Internet might indeed become necessary;

2. asks the Commission to do so only after a thorough inquiry into the degree of implementation of the Recommendation and into problems that will have arisen and into those potential problems which may be expected to arise; also considering the need to differentiate the rules concerning credit cards, payment cards, cash cards and payment systems;

3. observes that the Recommendation’s applicability to Internet transactions is anything but clear;

4. asks therefore the Commission to present in the meantime, in a separate text, a viable draft for a legal solution to problems related to money transactions effected in connection with the Internet;

5. holds that it will, in case of proposed legislation in the field, not accept provisions relating to scope and definitions as enigmatic and unclear as those contained in Articles 1 and 2 of Recommendation 97/489/EC;

6. communicates to the Commission its preference for autoregulatory mechanisms rather than heavy legislation for attaining consumer protection and high security standards; the core of such an autoregulatory mechanism could in particular consist of liability arrangements constituting at the same time an incentive

   - for issuers of electronic payment instruments to avert possible losses through high security standards and

   - for holders to avoid being held liable for losses acting cautiously and with due diligence;

7. states that in order to make autoregulatory mechanisms effective at least three sets of rules have to be introduced:

   (a) rules aimed at ensuring customer awareness about potential liabilities,

   (b) clear and fair provisions on liabilities arising in case of loss or theft and

   (c) rules on the burden of proof in cases of loss or theft of electronic payment instruments which do not render proof excessively difficult or virtually impossible for holders suffering the consequences of such situations;
8. is of the opinion that customer awareness can only be fostered by an obligation on the issuer to hand copies of the contract and all applicable conditions, written in an understandable form, or made available by electronic means, when the client has given an electronic address, to the client;

9. is further of the opinion that liability arrangements such as those laid down in the Recommendation and in particular in Article 6 constitute an interesting example of fair rules in that field;

10. regrets that the key issue of the burden of proof has not fully been addressed in the Recommendation nor has the deplorable practice of banks charging commission in addition to their buying/selling margin of profit;

11. suggests that the problem of proving certain constituting elements of the client’s claims in issues relating to liability after loss or theft could be resolved through dispositions contained in substantive Community law, to be transposed into substantive national law which either

(a) rule that it suffices for the realization of a claim of a card holder that the latter provide some evidence making the existence of a certain factual situation credible or highly probable, or

(b) rule that the provision of some evidence has to be considered as having the value of a full proof in the sense of the national legal system applicable;

12. welcomes rules on the value of electronic signatures which will avoid situations which place the whole risk on the consumer; believes that Article 6 paragraph 3 of Recommendation 97/489/EEC could constitute an interesting starting point for binding legislation in that field;

13. instructs its President to forward this resolution to the Commission, the Council and the Parliaments of the Member States.
I. HISTORICAL SURVEY

The present Recommendation 97/489/EEC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder has become necessary in order to update the European Commission’s Recommendation concerning payment systems, and in particular the relationship between cardholder and card issuer (88/590/EEC)¹ of 17 November 1988. The 1988 Recommendation, directed at card issuers, laid down common minimum standards which would govern some of the terms and conditions on which banks and other institutions issue payment cards.

In 1994, the International Consumer Policy Bureau published a report on payment card terms and conditions². The objective of the study was to find out to what extent payment card terms and conditions in the Member States of the European Union comply with key aspects of the 1988 Recommendation. The results were unsatisfactory. In all Member States, payment card terms and conditions violated the requirements set out in the Recommendation. Concerns were expressed about the extent of the parties’ respective liabilities in the event of loss or theft of the payment instrument and the question of the burden of proof in case of disputes and about the availability of comprehensive customer information on payment instruments and on effective redress procedures.

In the past nine years, the use of cashless payment instruments has soared. Payment cards account now for a sizeable portion in the market of payment instruments³. Also a completely new generation of products has been developed since the 1988 Recommendation was adopted. We now know two categories of new products. First, there are the "bank-account-access” products. These are instruments that provide for remote access to accounts held at financial institutions, typically banks. This category includes home-banking and phone banking applications, as well as payment cards. Secondly, there are the "electronic money” products. These are instruments on which value is stored, whether as magnetic strip, micro circuit cards or computer memories. Furthermore it is foreseeable that combinations of the different products will also appear, e.g. of electronic money and old forms of payment instruments.

It is expected that by the end of the next decade a significant share of retail commerce will be effected by the Internet.

In January, a Chip-Secured Electronic Transaction initiative started. It will conclude at the end of December 1997. C-SET is one of the ISIS⁴ projects, launched by the European Commission⁵. Its purpose is to develop and validate a secure payment protocol for customer-to-business transactions using micro chip cards over open networks, typified by the Internet. The results will be made publicly available on the web in the beginning of next year.

Another initiative, named E2S⁶ is an ESPRIT 4-programm project⁷. The aim of this project is to contribute to the growth of electronic commerce on the Internet by developing and installing end-to-end security mechanisms for commercial transactions using the Internet infrastructure. The results can also be expected in 1998.

The Commission took these new elements into consideration when issuing Recommendation 97/489.
II. THE 1997 RECOMMENDATION

A. Justifications for Community action

The main argument for action at European level would have been that equal conditions of competition within the Community must be assured. Yet, the Recommendation is worded in terms which primarily seek to ensure consumer protection.\(^8\) Nevertheless, it can be argued that an equal level of consumer protection is an important factor of competition. More and more intertwined national economies, the introduction of the Single Currency and the resulting increase in cross border financial transactions in the internal market would also justify Community action.

B. The 1997 Recommendation - just a preparative step towards a directive?

With a deadline of 31 December 1998, the Commission calls on the issuers of electronic payment instruments to act in accordance with the 1997 Recommendation, and on the Member States to ensure that there are adequate and effective means for settling disputes between issuers and users.

"If the new Recommendation is not implemented satisfactorily at the end of 1998, the Commission will propose a Directive in this domain", declares the Commission on page 5 of its Communication.

It would be quite optimistic to expect that the current Recommendation will lead to a better result than its predecessor. For now, Denmark is the only country which has statute legislation dealing specifically with payment cards\(^9\). Some other Member States have laws, notably on consumer credit or on contract terms, which apply to some extent to the use of payment cards\(^10\).

The Rapporteur believes that proposing a draft directive might indeed become inevitable. In any case, the Commission should only do so after a serious inquiry into the degree of implementation of the Recommendation and into problems that have possibly arisen and into those which will be expected to arise.

C. Interests at stake

Although they both gain from well organised electronic payment systems, banks’ interests and consumers’ interests often differ from each other.

Consumer Organisations claim that if banking terms and conditions are binding, consumer’s protection can be guaranteed. They emphasize the need for transparency and the importance of liability arrangements in the event of loss or theft of the payment instrument.

Banks on the other hand, do not seem to agree with these arguments. They are convinced that legislation of any kind would check the progress of electronic means of payment\(^11\). They are still investing substantial amounts of money into research and development of high-tech payment systems. They distrust in severe legislation because it could make them less competitive on a worldwide scale\(^12\).

D. The scope of application of the Recommendation - Internet

Payments (or, more generally speaking, ‘actions’ which give rise to more or less irrevocable transfers of funds) via Internet can assume at least three possible forms: (a) With a special device capable of reading a *tangible* electronic payment (or electronic money) *instrument*\(^13\) or (b) without using a
tang ble electronic payment (or electronic money) instrument but code-secured or (c) by mere communication of a credit card number and other personal data to the service provider.

As an example for the first form the C-SET initiative has already been mentioned above under I./A, fifth paragraph. It should be noted that the applicability of the Recommendation is conditioned by the derogation contained in Article 1 (2).

The draftsperson herself is a customer of service providers of the second form. Several types of transactions such as the acquisition or selling of equities or the simple payment of bills can thus be effected via Internet. Under a type (b) system transactions can only take place if the user enters very complicated and ever-changing secret code-combinations.

The third form of payment via Internet is the logical extension of payment by credit card upon oral telephonic communication of the card number to the service provider. This form of payment is already wide-spread and requires from a strictly legal point of view clauses in the relevant contracts between the bank, the issuer and the holder of the credit card or oral or tacit agreements between the concerned parties allowing for the resulting transactions by the bank after mere communication of the card number to the service provider. Form c) contains high security risks. Persons to which the credit card number is communicated or 'hackers' could commit abuses.

The Recommendation’s applicability to Internet transactions is anything but clear.

Article 1 provides that the Recommendation applies to certain forms of transactions: "(a) transfers of funds, other than those ordered and executed by financial institutions, effected by means of an electronic payment instrument" and "(b) cash withdrawals by means of an electronic payment instrument and the loading (and unloading) of an electronic money instrument, [...]".

Article 2 (a) defines an 'Electronic payment instrument' as "an instrument enabling a holder to effect transactions of the kind specified in Article 1 (1). This covers both remote access payment instruments and electronic money instruments."

This definition is clearly circular and tries to disguise that no definition of the term 'electronic payment instrument' is given. What is an instrument? Does it have to be tangible? The English and the German versions seem to suggest that. They speak of 'holder' and 'Inhaber' respectively. It can be argued that an intangible 'instrument' - such as the mere knowledge of a code combination - does not allow 'holding' or 'Innehabung'. Tangible instruments rather than intangible are susceptible to loss and theft (mentioned in Article 6 (1)). Finally, only tangible instruments can be physically presented in the sense of Article 6 (3).

On the other hand, Article 2 (b) which defines the notion of the 'remote access payment instrument' includes "in particular payment cards (whether credit, debit or charge cards) and phone- and home-banking applications". Phone- and home-banking applications usually work without tangible instruments and upon mere entry of code combinations. In any case, the definition given under Article 2 (b) has to be read together with Article 2 (a) second phrase.

The interpretation of this legislative chaos which appears to be best in line with the Recommendation’s main purpose is that 'instruments' have to be tangible with the exception of phone- and home-banking applications, explicitly mentioned in the last phrase of Article 2 (b). Under the assumption that phone- and home-banking applications are thus at least theoretically covered by the Recommendation, it remains doubtful as to which extent the main dispositions of the
Recommendation, referring to loss and theft, can, by their very nature, be applied *in concreto* to code combinations.

As a first conclusion, it has to be stated that if an electronic payment instrument has to be tangible - and the arguments in favour of this interpretation prevail -, then Internet transactions as described under (b) would not be covered by the Recommendation.

Secondly, it can be stated that the Recommendation applies to the 'instruments' needed for the transactions described under (c). However, the transaction as such (as described under (c)) remains subject to all valid clauses contained in the contract binding holder and issuer and to the safeguards of Article 6 (3): "By derogation from paragraphs 1 and 2, the holder is not liable if the payment instrument has been used, without physical presentation or electronic identification (of the instrument itself). The use of a confidential code or any other similar proof of identity is not, by itself, sufficient to entail the holder’s liability." Article 6 (3) is clearly applicable to a mere communication of a credit card number.

Thirdly, the Commission should be invited to present, in a separate text, a viable legal solution for transactions (i.e. above all: transfers of funds) effected in connection with the Internet.

Fourthly, given the unclear, circular and even contradictory nature of the Recommendation, any Commission proposal of a draft directive has to contain clearer definitions, should contain clear legal consequences for all situations to which it applies and should in any case cover transactions (i.e. above all: transfers of funds) effected in connection with the Internet.

E. Key issues

It appears to the draftsperson that autoregulatory mechanisms can, to a certain extent, ensure consumer protection and replace detailed legislation. The basic idea is that a sensible participation by issuers of electronic payment instruments in losses arising due to abuse of the electronic payment instrument by third persons will be the main incentive for issuers to develop ever more sophisticated security provisions. It is useful mentioning that issuers are increasingly concerned about growing losses. They claim that last year alone, counterfeit card fraud grew by an astonishing 70 per cent.

This concerns above all (old fashioned) magnetic stripe cards.

Furthermore, a reasonable participation by the card holder in those losses up to a maximum amount will make holders cautious and avoid undesirable situations.

In order to ensure the effectiveness of the afore-mentioned autoregulatory mechanism, three main problems have to be resolved. They relate to customer awareness through transparency, the extent of the parties’ respective liabilities in the event of loss or theft and the burden of proof concerning liabilities in case of disputes.

1. Transparency requirements

In order to enable them to act responsibly, customers should be aware of their rights and obligations.

With a view to ensure transparency, minimum standards are set out in section III. Article 3.1. determines that "the issuer has to communicate to the holder the contractual terms and conditions governing the issue and use of the electronic payment instrument".
The legal relationship between banks and clients is of contractual origin. The agreement is the legal foundation for mutual obligations. In the banking sector, mutual obligations are completed by so-called general banking terms and conditions. In the case of electronic means of payment, specific conditions exist. It is obvious that banks are economically stronger than the individual customer. The customer's bargaining options are therefore limited to the principle "take it or leave it". Banking terms are binding from the moment in which the customer gives his/her consent.

Practically, the banking terms are hard to obtain. They are often not available at the local banking establishments. Banks try to solve this problem by having the customer sign a clause which refers to the terms. This cannot be accepted as being a real agreement with the terms and conditions, because the customer did not have a realistic occasion to know the content. It is up to the Courts of the Member States to judge in concreto and in compliance with their national civil law what terms and conditions have become part of the contract.

According to the Rapporteur, article 3.1. of the Recommendation should be modified to the effect that copies of both the contract and the terms have to be handed to the holder, upon signature of the contract or in any event in good time prior to delivering the electronic payment instrument. In any case, if the terms are not available in the local establishment, or if they are on the back of an application form, or integral with it, and no copy of that form is handed to the consumer, then the communication obligation as set out in the Recommendation should be considered as not fulfilled.

Article 3.2. refers to the comprehensibility of written contract terms. Research showed that the language used in written terms from several countries, was very formal and legalistic and therefore quite difficult to understand. Information which a card issuer wants the customer to read or to be attracted by is frequently in large, clear type, but the small print is routinely used for the terms and conditions themselves. If card issuers can spend large sums on printing attractive, well-designed promotional material for their cards, they cannot expect consumers to be convinced that the reason the terms are difficult to read is because of the high cost of printing.

It remains unclear, however, what legal consequences the Recommendation foresees in case of non-compliance with the comprehensibility requirement. According to the Rapporteur, the answer to that question has to be found in the national civil law which has to be applied by the competent judicial authority.

2. Liability issues

2.1 Liability and notification

The 1994 study by Mitchell and Thomas found that there are still some countries where issuers do not provide an around the clock telephone service for the notification of theft or loss.

Under the 1997 Recommendation, card holders are obliged to notify the issuer without delay after they become aware of the loss or theft of their payment instrument (Article 5.(b)). Issuers shall provide means whereby a holder may at any time of day or night notify the loss or theft of the payment instrument (Article 9.1). It would be better to speak about "all reasonably accessible means", like a telephone number, to prevent e-mail or the Internet (often not accessible in the circumstances of loss or theft) from becoming the only means provided by banks.
1. Liability before notification

Up to the time of notification, the holder bears the loss, up to a limit which may not exceed ECU 150. "Only when the holder has acted with extreme negligence or fraudulently, such limit does not apply." (Article 6.1.).

ii.) Liability after notification

As soon as the holder has notified the issuer, he/she is no longer liable for the loss arising in consequence of the loss or theft of the electronic payment instrument, except when he/she acted fraudulently (Article 6.2.).

2.2 Most current situation (example)

Suppose a person’s payment card is stolen on a Friday evening. Unfortunately, he/she only realizes the theft on Monday morning, when he/she needs the card. Notification is made on Monday, at 11 a.m. Half a day later, at 4 p.m., the account and the card are blocked, but damage has occurred. During the week-end, ECU 200 was withdrawn in cash from an automatic teller machine. Monday afternoon, at 2 p.m., another ECU 100 was spent with the stolen payment card. In all cases the bank debits the sums withdrawn in cash. Assuming that the card holder did not act fraudulently or with extreme negligence, he/she will have to bear the loss up to a ECU 150 limit. The bank will bear the other ECU 50 that was withdrawn before notification, as well as the ECU 100 that was spent on Monday between 11 a.m. and 4 p.m.

2.3 Other possible situations

The situation as explained above, assumes that the innocence of all parties as well as all the facts were proven, so that extreme negligence and fraud could be excluded. In real life, it is not easy to do so. In the case of abuse of a payment card, several facts will have to be proven. A payment card can be taken away and used by a third party, because the holder was not careful enough or did not take all reasonable steps to keep safe the electronic payment instrument and/or the means which enable it to be used (such as a PIN code). A card holder could also abuse his own payment card, while giving the impression that a third person is doing so. Hypothetically, even banks could commit fraud by debiting an account for an amount nobody spent. In all cases liability mainly depends on what can be proven, which in turn depends on by whom the burden of proof has to be borne.

3. Burden of proof

At least as important as the liability arrangements themselves is the question by whom the burden of proof has to be borne. Claims can only be realized when the facts are proven; idem est non esse ac non probari.

How facts have to be proven remains a matter of national law. Community legislation in this field is hardly conceivable. It is legitimate to ask why the Commission enacts a recommendation concerning electronic means of payment, given the fact that the Community has no competence to legislate in the field of the all-determining issue of proof if it was to do so through harmonisation of national procedural law.

In the case of dispute between contracting parties, three levels of establishment of facts can be imagined.
1. In order to start a procedure, a claim needs to be expressed. Explicit legislative provisions could theoretically dispose that a mere claim is sufficient for obtaining a defined advantage. Such a rule can, of course, not be accepted in a reasonable legal system in the context discussed here.

2. However, in legal systems based on the rule of law, mere claims are insufficient. Claims need to be supported. A legal system could contain a rule declaring that (under certain and well-defined circumstances) it is sufficient to provide just some evidence in order to make the factual situation required by a certain norm at least credible or highly probable.

3. A legal system can contain a norm to the end that the authority deciding a case has to consider facts proven if they can be sufficiently corroborated. Usually, judges have a certain margin for appreciation. Most legal systems require that the judge has to be fully convinced about the existence or non-existence of facts.

   It should be borne in mind that in liability disputes between cardholder and card issuer it is often practically impossible to require full proof. But what level of establishment of facts should be required?

   For the purposes of the Recommendation, the application option (2) could be appropriate. Option (3), if handled by judicial authorities with fairness and equity and without excessive requirements vis-à-vis card holders, could also be taken into consideration. Experience will show whether courts apply the margin of discretion they have under option (3) in a satisfactory manner.

   If not, it could be imagined, that substantive Community law (i.e. a future directive on electronic means of payment), to be transposed into substantive national law, contains a disposition which

   (a) either rules that it suffices for the realisation of the claim of a card holder that the latter provides some evidence making the existence of a certain situation credible or highly probable or

   (b) rules that the adduction of some evidence has to be considered as having the value of full proof in the sense of the national legal system applicable.

   If general conditions of a contract, stipulated between card issuer and card holder [according to the principle of contractual autonomy and within the limits of imperative civil and procedural law] can contain clauses according to which certain factual situations constitute proof or are not susceptible of proof, why should a Community directive not be capable of the same?

4. 'Extreme negligence'

   Extreme negligence is a vague concept. The reasoning cannot start with the assumption that the system is infallible. They argue that a payment card cannot be used without the PIN code, and that if the card is used, the user knows the PIN. The user can only know the PIN because the card holder has disclosed it or was not careful enough in keeping it secret. The 1997 Recommendation excludes that the use of a confidential code by itself is sufficient for proving the holder's liability (Article 6.3., in fine). In fact, codes can be cracked. Computer experts only need technical devices to read codes from a distance at the moment when a client enters the his conde into the system. In most cases, the judge will have to decide whether or not the holder has acted with extreme negligence. Banks often determine in their conditions governing the use of the electronic means of payment some action as being "extremely negligent", in order to avoid discussion afterwards. This can only be a solution if such conditions are compatible with imperative national civil law.
5. Acting fraudulently

According to the rapporteur the interpretation of the words "acting fraudulently" in article 6.2 should not be restricted to the sole crime of "fraud" in the sense of the applicable penal code. A holder would also be acting 'fraudulently’ if he/she infringed the penal law of the Member State concerned.

When fraud is proven, not only will the holder bear all loss, but he/she will also be punished for having committed a criminal offence or crime (as the case may be).

F. Electronic signatures

Contract conditions governing the use of electronic means of payment may contain provisions to the effect that any use of a given ‘code’ has the same legal value as a signature. In case of abuse by third persons, such clauses can only work to the detriment of the holder. This is one of the reasons why the last prase of Article 6 (3), rules the following: "The use of a confidential code or any other similar proof of identity is not, by itself, sufficient to entail the holder´s liability."

The problem of the legal value of electronic signatures persists in areas not or not fully covered by the present Recommendation, such as ... the Internet.

G. The 150 ECU limit

The Commission set the liability threshold at 150 ECU without any further explanation. It appears from the examination conducted by Mitchell and Thomas that in some Member States the limits were above 150 ECU, but in most it was below. In some cases, there was no limit at all. For more details see Annex I. The limit of 150 ECU therefore seems to be acceptable.

H. Holders acting without account cover

The issue of holders effecting transactions without a sufficiently covered account does not seem to be of primordial importance. On the one hand, such holders may become liable under civil law or/and become liable to prosecution under national criminal law. On the other hand, it is in the issuers own interest to take the necessary safety measures aimed at preventing a holder from making use of his payment instrument in case such transactions were not sufficiently covered.
Table: Limits to the card holder’s liability **before** notification of the loss or theft of the payment card\(^{38}\)

<table>
<thead>
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<th>Member States</th>
<th>Issuer (examples)</th>
<th>Limitation</th>
<th>Exception</th>
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<tbody>
<tr>
<td><strong>- Belgium</strong></td>
<td>- Kredietbank</td>
<td>- 143,- ecu</td>
<td>- faute grave, mauvaise foi</td>
</tr>
<tr>
<td></td>
<td>- Generale Bank</td>
<td>- 143,- ecu</td>
<td>- bedrieglijk, opzettelijk, grove nalatigheid</td>
</tr>
<tr>
<td></td>
<td>- American Express</td>
<td>- 48,- ecu</td>
<td>- extreme negligence</td>
</tr>
<tr>
<td><strong>- Germany</strong></td>
<td>- Deutsche Bank</td>
<td>- 100,- DM</td>
<td>- Pflichten grob fahrlässig verletzt</td>
</tr>
<tr>
<td></td>
<td>- in general:</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>- Denmark</strong></td>
<td>- Bikuben: Dancard</td>
<td>- 150,- ecu, IF issuer can prove the use of the PIN code.</td>
<td>- no limit if it can be proven that the holder deliberately gave the PIN to an abusing third party</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- limit =1 000,- ecu if acted with gross negligence, if the loss was not reported in time or if card was given to an abusing third</td>
</tr>
<tr>
<td><strong>- France</strong></td>
<td>- American Express</td>
<td>- 100,- ecu</td>
<td>- extreme negligence</td>
</tr>
<tr>
<td></td>
<td>- Caisse d'épargne</td>
<td>- 500,- ecu if card is used for a payment</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- 100,- ecu in all other cases</td>
<td>- faute ou imprudence opposition tardive, utilisation par un membre de la famille</td>
</tr>
<tr>
<td><strong>- Italy</strong></td>
<td>- most issuers:</td>
<td>- no</td>
<td>- extreme negligence</td>
</tr>
<tr>
<td></td>
<td>- American Express</td>
<td>- 150,- ecu</td>
<td></td>
</tr>
<tr>
<td><strong>- The Netherlands</strong></td>
<td>- ABN Amro</td>
<td>- 35,- ecu</td>
<td>- with use of the PIN: 150,- ecu</td>
</tr>
<tr>
<td></td>
<td>- Euroshell</td>
<td>- 150,- ecu</td>
<td>- no limit if notified outside a period of 30 days</td>
</tr>
<tr>
<td><strong>- United Kingdom</strong></td>
<td>- Barclays Bank</td>
<td>- 32,- ecu</td>
<td>- extreme negligence</td>
</tr>
<tr>
<td></td>
<td>- most banks:</td>
<td>- 65,- ecu</td>
<td></td>
</tr>
<tr>
<td><strong>- Greece</strong></td>
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<td>- no</td>
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3. The number of payments by card per inhabitant has increased from 7 in 1990 (in the 12-EC Member States) to 14 in 1995, while their share as against the total number of payment transactions has grown from 9% in 1990 (12-EC) to 13.5 in 1995, COM(97)353, p. 2.

4. Information Society Initiatives in support of Standardisation.

5. DG. III / B-3.

6. End to end security over the Internet.

7. DG. III / F-6.

8. See recital 8.


10. E.g.: Belgium: "Loi relative au crédit de la consommation de 12 Juin 1991".

11. Barclaycard presentation to MEP's, 5 November 1997, New technologies, new means of payment (Presentation by Roger Alexander, Director of Barclaycard), p.8: "Regulation is clearly important, but must not inhibit innovation.

12. Barclaycard presentation to MEP's, 5 November 1997, New technologies, new means of payment (Presentation by Roger Alexander, Director of Barclaycard), p.4.: "My fear is that too much emphasis will be placed regulating the traditional financial providers and that the new players from outside the European Banking industry will not have the same rigorous regulations applied."

13. Please note the derogation contained in Article 1 (2).


17. E.g.: for Belgium: art. 1108 B.W.

18. STAUDER, B., "Le contrat entre l'émetteur des moyens d'accès au système de transfert électronique de fonds et le consommateur", in: Electronic funds transfer and consumer protection, BOURGOIGNIE, Th. and GOYENS, M. (Eds.), Brussels, Story-Scientia, 1990, XX.

This does not mean that the customer has to read the terms as well. He has got to have the possibility to read the terms before the contract is closed. If problems arise, the mere fact of not having read does not exclude acceptance of the agreement.

21. Under Belgian law, for instance, the judge will determine if clients had the possibility to know their rights and obligations, applying the general principles of contracting law (see VANANROYE, J., Debetkaarten, Leuven, 1992, p.26).

22. Note: A different solution has been chosen by the Commission in its proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees (COM(95)520) in Article 5 (2): "The guarantee must feature in a written document which must be freely available for consultation before purchase and must clearly set out the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee, as well as the name and address of the guarantor."

A nearly identical solution was approved by the Legal Affairs Committee in its opinion on that proposal, document PE 219.735/def..


24. The same standards were taken into consideration in the report on Payment cards and conditions in 1994. Paragraphs 3.1 and 5 EC 88/590 were interpreted to mean that the consumer should have a written copy of the contract available at all times. "If the terms and conditions were on the back of the application form, or integral with it, with no copy available, then the terms have been considered not to comply, even though a copy might be made available to the consumer later if and when the card is issued." from: International Consumer Policy Bureau, Payment card terms and conditions, by MITCHELL, J. and THOMAS, W. H., 1994, p. 84.


27. E.g.: Italy, see Mitchell/Thomas, op. Cit., p.49: "Banca Commerciale Bancomat, Banca Nazionale del Lavoro Bancomat, Caramate Bancomat, Cassa di Risparmio in Bologna Bancomat and Servizi Interbancari CartaSi gave no information in the terms and conditions, but although it seems that information is given when the card is issued, the notification service available is understood not to be a 24h. one."

28. "In Italy, there have been three cases, in 1982, in 1989 and in 1993, all concerned with the liability of the consumer when there is a delay in notifying the loss of a payment card. In the latest report, Apollo di Milano, 16 Novembre 1993 - Lombardo V. Banca d'America e d'Italia, (reported in I Contratti n° 2, 1994), the customer only realised that the card had been lost after one month, when he notified the bank. In the meantime the card had been used 68 times to draw about eight million lire (ca. 34.000 ecu). The bank alleged that the customer lacked diligence as it had taken him so long to realise that he did not have his card anymore. The customer claimed that the bank should have realised that the signature did not tally and that there was an odd pattern of card usage. The court decided that the customer was fully liable, because the contract imposed upon him a duty to prevent fraudulent use of the card by notifying the bank of the loss, which should have been done at the earliest opportunity. The delay made the notification far too late and amounted to negligence on the part of the consumer in looking after the card. Similar judges were given in the two earlier cases." (see Mitchell/Thomas, op. Cit., p. 46 - 47).

29. E.g.: Card Stop : "Le titulaire de la carte peut atteindre Card Stop tous les jours de la semaine, week-end compris, 24h sur 24 au n° de téléphone suivante: (070)344 344 pour déclarer le vol, la perte ou tout autre risque d'usage abusif de sa carte.", KB-Eurocard Belgium.

30. "Sur 7015 lecteurs de Que choisir interrogés, 1712, soit un sur quatre ont rencontré des problèmes avec leur carte. Une fois sur huit, il s'agissait d'un litige survenu suite à un vol ou à un contrefaçon", Que choisir, n° 292, France.

31. See article 5.(a), 1997 Recommendation.

32. Personal Identification Number.

33. MAUSSION, C, "des puces en flagrant délit", Que choisir, p.53.
35. E.g.: Bedingungen für die Deutsche Bank-Kreditkarten: Art. 9, in fine: "...es sei denn, der Karteninhaber hat seine Pflichten grob fahrlässig verletzt, (z.B. den Kartenverlust schuldhaf
t nicht umgehend mitgeteilt, die PIN auf der Karte vermerkt oder zusammen mit dieser verwahrt), E.g. 2: Règlement KB, article 18: "Peuvent être considérés comme faute grave notamment le fait de conserver l'ensemble la carte et le numéro de code secret ou le non respect par le titulaire de la carte de ses obligations, ou le transgression des mesures de sécurité comme le fait de ne pas avertir à temps la Société ...".

36. See Conditions générales des Cartes Visa BBL et Eurocard-MasterCard BBL, et de la fonction Flexis, édition 1997, Article 5, dernière phrase: "L'introduction de ce numéro de quatre chiffres dans un terminal destiné à cet usage, constitue la signature électronique du bénéficiaire; celle-ci équivaut, notamment pour l'application des dispositions légales en matière de preuve, à sa signature manuscrite pour toute opération électronique.".

37. In a "Cour de Cassation" decision of 1 March 1994 (see Que Choisir?, June 1994) the following situation was judged: A woman's handbag containing her payment card was stolen. The thief used the card to draw 9,600 FF (= 1,600 ecu). The woman notified the bank in good time, then confirmed in writing. The terms provided that all losses before notification were payable by the consumer and that if there was any dispute about notification, the date of written confirmation would take precedence. The woman lost her 9,600 FF.