EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 12 July 2000

at the request of the Luxembourg Ministry of Finance on 'Chapter VII – Electronic Payments' of a Luxembourg legislative proposal concerning electronic commerce

(CON/00/11)

1. On 3 May 2000, the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an ECB opinion on 'Chapter VII – Electronic Payments' of a Luxembourg legislative proposal concerning electronic commerce (hereinafter referred to as the 'Draft Law').

2. The ECB's competence to deliver an opinion is based on Article 105 (4), second indent, of the Treaty establishing the European Community and on the second indent of Article 2 (1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions, as the legislative proposal contains provisions concerning means of payment. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, this ECB opinion has been adopted by the Governing Council of the ECB. This ECB opinion is based on an unofficial English translation of the official proposal written in French.

3. The ECB welcomes the Luxembourg initiative to strengthen customer confidence when making payments over the internet whereby Commission recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder (the 'recommendation') is given due consideration. The ECB is, however, of the view that some parts of the recommendation, for example in the Section on '*transparency of conditions for transactions*' (Section II of the recommendation) and certain aspects of the Section on '*obligations and liabilities of the parties to a contract*' (Section III of the recommendation), have not been entirely transposed. The ECB understands at the same time that a number of provisions of the recommendation, which have not been transposed in the Draft Law, are covered by provisions of the Luxembourg Civil Code.

4. The ECB understands that the Draft Law has taken account of the proposal for: 1) a directive of the European Parliament and of the Council on the taking up, the pursuit and the prudential supervision of the business of electronic money institutions; and for 2) a directive of the European Parliament and of the Council amending Directive 77/780/EEC on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions; which proposal, once adopted, would be implemented in Luxembourg in a separate law.

5. With regard to the definition, in Article 75(1) of the Draft Law, of '*electronic funds transfer instrument'* (as '*any system which permits the following transactions to be effected either fully or partly electronically: a) the transfer of funds; b) cash withdrawals and deposits; c) remote access to an account; and d) loading and unloading of a reloadable payment instrument'*), the ECB finds it somewhat ambiguous that such instrument is defined by reference to the term '*system'*. The use of the term '*system*', combined with a reference to the transfer of funds, could be read to mean that in principle any interbank transfer system can be defined as '*electronic funds transfer instrument*' which should not be the case. Therefore, the ECB would like to propose to replace the word '*system'* with '*instrument'*. Also, to add clarity, the definition could be reformulated as '*any instrument which permits one or more of the following transactions to be effected either fully or partly electronically: a) the transfer of funds; b) cash withdrawals; c) deposits; d) remote access to an account; e) loading and unloading of an electronic money instrument.'*

6. In Article 75 (2) of the Draft Law, '*reloadable instrument*' is defined as '*any electronic funds transfer instrument on which value units are stored electronically'*. The ECB would, however, like to propose that the concept of '*electronic money'* be used instead throughout the Draft Law. '*Electronic money'* is defined in Article 1(3) (b), of the proposal for a directive of the European Parliament and of the Council on the taking-up, pursuit of and prudential supervision of the business of electronic money institutions as '*monetary value as represented by a claim on the issuer which is (i) stored on an electronic device; (ii) issued on receipt of funds of an amount not less in value than the monetary value issued; (iii) accepted as means of payment by undertakings other than the issuer'*. In accordance with this concept, also non-reloadable electronic money usage devices (basically disposable electronic money cards) would fall within the purview of the definition. The ECB is of the view that disposable cards should also fall within the scope of this Draft Law.

   As according to the recommendation, the term '*electronic money instrument'* only comprises reloadable but not non-reloadable instruments, the ECB would welcome that if this term would subsequently be introduced in the Draft Law, it would then be defined more broadly.

7. Regarding the definition of an '*issuer'* (as '*any person who, in the course of his/her business, makes available to another person an electronic funds transfer instrument pursuant to a contract concluded with him/her'*) in Article 75(3) of the Draft Law, it would seem reasonable to replace the reference to '*any person*' with '*any legal person*' (and, correspondingly, replace the reference to *'his/her'* with '*its'* and *'it'* respectively). Secondly, it is not clear whether the definition refers to the issuer of the electronic funds transfer instrument or the issuer of the card/software on which the electronic money is stored. Therefore, one possibility to achieve further clarity would be to include after the term 'issuer' the words 'of an electronic funds transfer instrument'.

8. With respect to the definition of a '*holder*' (as '*any person who, pursuant to a contract concluded between themself and an issuer, holds an electronic funds transfer instument'*) in Article 75(4) of the Draft Law, the paragraph could be redrafted as such that also persons possessing an electronic money instrument are included.

9. The scope of the Draft Law has been defined in Article 76 in the negative. In principle, this means that the Draft Law would apply to everything except to those two issues referred to in Article 76. In the recommendation, the scope has been defined in both a positive and a negative way, by stating to which transactions the recommendation applies and to which it does not apply. To add clarity, it would be beneficial to use the same approach also in the Draft Law.

10. The definition of single purpose electronic money contained in Article 76 (b) is not in line with the proposal for a directive of the European Parliament and of the Council on the taking up, the pursuit and the prudential supervision of the business of electronic money institutions. Therefore, the sentence in question could be reformulated e.g. as follows: '*The provisions of this law shall not apply to (b) electronic funds transfers carried out by electronic money instruments which can only be used to pay for products bought from and/or services provided by the issuer of electronic money in question.***'** Article 79 of the Draft Law does not refer to transactions undertaken by means of reloadable instruments, even if this transaction is of loading/unloading nature. The ECB proposes to include such transactions into the scope of this Article.

    With respect to the second sentence of Article 79(1) of the Draft Law in which it is stated that the issuer shall make available to the holder the appropriate means to make the notification, the ECB is of the view that a sentence should be added referring to the obligation of the issuer to provide the holder with evidence that such notification was made. In detail, such an additional sentence should stipulate that the issuer provide the holder with the means of proof that the holder has made a notification in case the notification was made by telephone.

Furthermore, it is not clear what the second bullet point of Article 79(2) refers to. This could be clarified by changing the order of the sentences in this paragraph.

11. Further to the issuer's obligations and liabilities, the ECB is of the view that the obligations and liabilities of the issuer as laid down in Section III of the recommendation have only partly been considered in the Draft Law. With respect to the issuer's liabilities, it seems that neither the Draft Law nor the Luxembourg Civil Code contains provisions that correspond to Article 8 of the recommendation. The ECB would, therefore, like to propose to insert rules in the Draft Law aimed at transposing Article 8(1), (3) and (4) of the recommendation. Regarding the issuer's obligations, the ECB notes that the Draft Law leaves out the secrecy of the holder's personal identification codes (Article 7(2)(a) and (b) of the recommendation). Also with respect to this issue, the ECB would welcome that additional corresponding provisions be inserted in the Draft Law.

12. The ECB proposes that provisions about notification (Article 9 of the recommendation) are included in the Draft Law. In particular, these provisions could stipulate that the issuer is obliged to provide means for notification at any time of the day and that the issuer is obliged to take actions in order to stop further use of electronic payment instruments upon receipt of notification.

13. The ECB confirms that it has no objection to this ECB opinion being made public by the competent national authorities at their discretion.

Done at Frankfurt am Main on 12 July 2000.

The President of the ECB

[signed]

Willem F. Duisenberg