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Payment intermediation in the European Economic Area

Introduction

Reliable payment systems contribute to secure financial systems and financial stability. In most countries central banks play an important role in their national payment systems. One of the Central Bank of Iceland's mandatory roles is to promote an efficient and safe financial system, including payment systems domestically and with foreign countries.[2] Recently the Central Bank has taken the initiative in adapting Icelandic payment systems to conform with international requirements.

What are these requirements and what is their foundation? As far as Icelandic payment systems are concerned, these can broadly speaking be divided into two groups. The first group comprises principles which have been formulated by the Bank for International Settlements (BIS) and provide for professional procedures and reliable payment system environments to reduce systemic risk.[3] These are known as the Core Principles for Systemically Important Payment Systems. Although these principles are not legally binding in Iceland, the Central Bank has aimed to shape Icelandic payment systems in such a way as to fulfil their requirements.[4]

The second category comprises acts which have been incorporated into the Agreement on the European Economic Area (EEA) and contain provisions on payment intermediation and payment systems. Primarily, this involves directives which have been incorporated into Annex IX to the EEA Agreement on financial services. Iceland is obliged to make these acts part of its legal order.

This article discusses the latter category of international requirements, i.e. provisions in EEA law on payment intermediation and payment systems. These provisions are based on EC law which necessitates some discussion of EC law in this field and its divergences from EEA law in this regard. The Community's aim concerning payment intermediation and payment systems is the creation of a Single Payment Area within the EU. This aim is closely linked to the objectives underlying the internal market and the monetary union. The Community institutions may be expected to adopt new legislation on payment intermediation in order to attain these objectives. The article discusses the effect that this may have on the EEA Agreement and the EFTA States, which are obliged to implement new acts concerning the internal market that have been incorporated into the EEA Agreement.

EC law on capital movements and payments

The free movement of goods, people, services and capital in the internal market is based on the prerequisite that no restrictions are imposed on payments. The right and duty to instigate free movement of capital includes this prerequisite for the four freedoms. Payments in connection with the movement of services, goods, people or capital between Member States shall therefore be free from all restrictions.[5]

Before the entry into force of the Maastricht Treaty, provisions on free movement of capital were stated in Arts. 67-73, cf. Article 106, of the Treaty of Rome. In addition, secondary legislation for the implementation of these provisions was adopted. *Directive 88/361/EEC*[6] represented an important step towards the liberalisation of capital movements.

1. The author is deputy director at the Central Bank of Iceland's Financial Stability Department. The views expressed in this article are the author's and do not necessarily reflect those of the Central Bank.
2. See Article 4 of the Central Bank Act no. 36/2001.
3. Kristinsson, pp. 58-63.
4. Ásgeirsson, pp. 75-78.
5. Kapteyn and VerLoren van Themaat, pp. 767.
6. Council Directive 88/361/EEC of 24 June 1988 for the implementa ion of Article 67 of the Treaty (OJ L 178, 08.07.1988, p.5).

Among other things, the Maastricht Treaty amended the provisions of the Treaty of Rome on free movement of capital. These are now stipulated in Arts. 56-60 (ex Article 73. b, c, d, f and g)[7] of the Treaty. After this amendment, freedom of capital movements now also applies to non-Member States. All restrictions on capital movements and payments are now prohibited within the Community, irrespective of whether they entail discrimination or not. This provision has direct effect.[8]

Payments are dealt with in Article 56(2) (ex Article 73 b) of the Treaty of Rome which states that within the framework of the provisions set out in Chapter 4 all restrictions on payments between Member States, and between Member States and third countries, shall be prohibited.

Economic and Monetary Union

Free movement of capital and payments was an important precondition for the establishment of Economic and Monetary Union (EMU). The single currency is intended to finalise the formulation of the single market.[9]

Provisions on economic and monetary policies are made in Arts. 98-124 (ex Article 102 a-Article 109 m) of the Treaty of Rome. EC law concerning the monetary union provides for, inter alia, the importance of payment intermediation and payment systems. Article 105(2) (ex Article 105) of the Treaty of Rome and Article 3 of the *Protocol on the Statute of the European System of Central Banks* and of the European Central Bank specify the main objectives of the system of central banks. One is to promote the smooth operation of payment systems. Under Article 114(2) and (4) (ex Article 109 c) of the Treaty of Rome, the role of the Economic and Financial Committee includes keeping under review the payment systems of Member States. Under Article 22 of its Statute, the European Central Bank (ECB) may make regulations to ensure efficient and sound clearing and payment systems within the Community and with other countries.

7. References in parentheses state the relevant provision in the Treaty of Rome before the signature of the Treaty of Amsterdam on October 2, 1997.

8. See Cases C-163/94, *etc. Sanz de Lera et al*., [1995] ECR I-4821, pp. 4837-9.

9. Craig and de Búrca, pp. 655-6.

EC derived legislation

EC derived legislation[10] on payment intermediation has been adopted in order to enhance the good functioning of the internal market. Derived legislation generally aims at liberalising capital movements and strengthening the internal market. EC derived law in this field is also closely related to the objectives of EMU. This relationship with the internal market, free movement of capital and EMU is clearly stated in the preambles to the directives that have been adopted on payment intermediation.[11] The main types of EC law in this field will now be dicussed.

Commission Recommendation 90/109/EEC of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions[12] stipulates principles for, *inter alia,* charges, commission fees and exchange rate, and the time needed for cross-border transactions. *Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments*[13] provides for minimum information contained in the terms and conditions governing the issuing and use of an electronic payment instrument, information subsequent to such a transaction and the obligations and liabilities of the parties to a contract. These recommendations are not binding, but may have a certain interpretative value.[14]

Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers[15] stipulates the obligation of credit institutions to promote transparency and efficiency with regard to cross-border credit transfers. Recital 6 of the preamble states that the purpose of

10. Discussions of EC law distinguish between primary and derived legislation. Derived legislation is adopted by the institutions of the Community and may take the form of regulations, directives, decisions, recommendations and opinions.

11. See recital 3 of the preamble to Directive 97/5/EC and recital 5 of the preamble to Directive 98/26/EC. See also the preamble to Recommendation 90/109/EEC.

12. OJ L 67, 15. 3. 1990, p. 39.

13. OJ L 208, 2.8.1997, p. 52.

14. In addition to these Recommendations, the Commission has issued Recommendation 87/598/EEC on a European Code of Conduct relating to electronic payment (OJ L 365, 24.12.1987, p. 72) and Recommendation 88/590/EEC concerning payment systems, and in particular the relationship between cardholder and card issuer. (OJ L 317, 24.11.1988, p. 55).

15. OJ L 43, 14. 2. 1997, p. 25.

the Directive is to improve cross-border credit transfer services and thus assist the European Monetary Institute (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. The Directive is based on Article 100a (now Article 95) of the Treaty of Rome, which provides for the achievement of the objectives set out in Article 14 (ex Article 7a) concerning the establishment of an internal market without internal frontiers.

Article 3 of the Directive provides that credit institutions and other institutions executing cross-border credit transfers shall make available to their customers, in writing, information on conditions for transfers, including the time needed for the transfer, calculation of commission fees and charges, the rates and complaint and redress procedures. Information shall also be supplied subsequent to such a transfer, cf. Article 4 of the Directive.

Article 6(1) of the Directive stipulates that the originator's institution shall execute the cross-border credit transfer in question within the time limit agreed with the originator. Where the agreed time limit is not complied with or, in the absence of any such time limit, the originator's institution shall compensate the originator, if funds have not been credited to the account of the beneficiary's institution at the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer order. The same applies when a delay is attributable to an intermediary institution. Article 6(2) of the Directive provides that the beneficiary's institution shall make the funds available to him within the time limit agreed with him. Where the agreed time limit is not complied with or where, in the absence of any such time limit, at the end of the banking business day following the day on which the funds were credited to the account of the beneficiary's institution, the funds have not been credited to the beneficiary's account, the beneficiary's institution shall compensate him.

If, after a cross-border credit transfer order has been accepted by the originator's institution, the relevant amounts are not credited to the account of the beneficiary's institution, the originator's institution shall credit the originator, up to EUR 12,500 plus interest and charges, cf. Article 8, of the Directive.

Article 10 of the Directive stipulates that Member States shall ensure that there are adequate and effective complaints and redress procedures for the settlement of disputes.

Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[16] aims at contributing to the efficient and cost-effective operation of cross-border payment and securities settlement arrangements in the Community, which reinforces the free movement of capital in the internal market. The Directive follows up the progress made towards completion of the internal market, in particular towards the freedom to provide services and liberalisation of capital movements, with a view to the realisation of Economic and Monetary Union.[17] The Directive seeks to minimise the disruption to a system caused by insolvency proceedings against a participant in it. Recital 9 of the preamble states that the reduction of systemic risk requires in particular the finality of settlement and the enforceability of collateral security.

The Directive covers both domestic and cross-border payment and settlement systems. Transfer orders and their netting should be legally enforceable under all Member States' jurisdictions and be binding on third parties. The Directive states that transfer orders cannot be revoked after a moment defined by the rules of the system. Insolvency proceedings should not have a retroactive effect on the rights and obligations of participants in a system. In the event of insolvency proceedings against a participant in a system, the rights and obligations of that participant shall be determined by the law governing that system. Member States shall notify the Commission as to the systems which are to be included in the scope of the Directive. The Directive is based on Article 100a (now Article 95) of the Treaty of Rome.

In addition to the above recommendations and directives, the European Parliament and the Council adopted on 19 December 2001 Regulation No. 2560/2001 on cross-border payments in euro. The regulation is outlined in the discussion of EU policy below.

16. OJ L 166, 11.16.1998, p. 45.

17. See recital 3 of the preamble to the Directive.

EEA law

To a large extent, the Community legislation on payment intermediation discussed above has been incorporated into the EEA Agreement. However, EEA law in this field is not as extensive as EC law. The following is an outline of the relevant provisions of the EEA Agreement.

The substantive rules in EEA law on capital movements and payments are comparable to those in EC law before the entry into force of the Maastricht Treaty. Provisions on free movement of capital are found in Arts. 40-45 of the EEA Agreement and in Directive 88/361/EEC which has been incorporated into Protocol XII to the Agreement. The term "free movement of capital" refers both to the freedom to transfer capital (and to invest) in general and also to the freedom to make "current payments" in connection with merchandise transactions and other elements of the four freedoms. Current payments are always associated with a specific agreement in law which forms their basis.[18] Payments are dealt with in Article 41 of the EEA Agreement, which states that current payments connected with the movement of goods, persons, services or capital between Contracting Parties within the framework of the provisions of the Agreement shall be free of all restrictions. This Article corresponds to Article 67(2) and Article 106(1) of the Treaty of Rome before the Maastricht Treaty.

The EEA Agreement does not extend to the economic and monetary policies provided for in Arts. 98-124 (ex Article 102 a-Article 109 m) of the Treaty of Rome. Nonetheless, cooperation between the Contracting Parties in this field is assumed in Article 46 of the Agreement. They shall exchange views and information concerning the implementation of the Agreement and the impact of the integration on economic activities and on the conduct of economic and monetary policies. However, this exchange of views and information shall take place on a non-binding basis.

Two Recommendations and two Directives relating to payments have been incorporated into Annex IX of the EEA Agreement on financial services, with both horizontal and specific adaptation,[19] i.e. Recommendation 90/109/EEC on the transparency of banking conditions relating to cross-border financial transactions, Recommendation 97/489/EC concerning transactions by electronic payment instruments,[20] Directive 97/5/EC on cross-border credit transfers[21] and Directive 98/26/EC on settlement finality in payment and securities settlement systems.[22] The content of these Recommendations and Directives is discussed above.

The Recommendations are not legally binding in Iceland and have not been implemented as law. Directive 97/5/EC has been transposed into the Icelandic legal order, cf. Act no. 128/1999, amending Act no. 87/1992 on Foreign Exchange, Regulation no. 56/2000 on Cross-border Credit Transfers and Regulation no. 679/1994 on Foreign Exchange. Directive 98/26/EC has also been implemented as law in Iceland, cf. the Act on the Security of Transfer Orders in Payment Systems no. 90/1990.[23]

Impact of the difference between EC law and EEA law

As explained above, EC derived legislation on payment intermediation and payment systems is based on the objectives of the internal market and the Economic and Monetary Union. The evolution of the internal market made Member States more economically dependent on each other and led to the need for greater economic cooperation among them, which later created the preconditions for a monetary union. The adoption of a common monetary policy and a single currency in fact requires that commerce and payment intermediation across borders should not be more burdensome and costly than within borders.

While the legal basis for EEA law governing payment intermediation and payment systems, as well as its objectives, differs from EC law, it is questionable what effect this difference will have on the interpre-

18. Stefánsson, p. 503.

19. Horizontal and specific adaptations are covered in Protocol 1 to the EEA Agreement.

20. Cf. Decision of the EEA Joint Committee No. 74/98 of 17 July 1998.

21. Cf. Decision of the EEA Joint Committee No. 1/98 of 30 January 1998.

22. Cf. Decision of the EEA Joint Committee No. 53/99 of 30 April 1999.

23. At the time of writing, the EFTA Surveillance Authority had not initiated any formal procedure concerning incomplete implementation of these Directives in the EFTA States, apart from the implementation of Directive 98/26/EC in Liechtenstein.

tation and further evolution of EEA law in this field. The crucial point is that the EEA Agreement does not directly extend to Economic and Monetary Union. EFTA States therefore do not play a direct part in the ECB's payment intermediation tasks, although the cooperation between the central banks of the EFTA States and those of the EU States (the ECB included) may involve payment intermediation.

It should also be borne in mind that Article 14 (ex Article 7a) of the Treaty of Rome states the obligation of progressively establishing an internal market without internal frontiers. The EEA Agreement, on the other hand, states the aim of creating a homogeneous European Economic Area with equal conditions of competition and the respect of the same rules, cf. Article 1 of the Agreement.[24] With respect to payment intermediation, however, the effect that this has on the incorporation of new Community legislation into the EEA Agreement, the implementation of such legislation by the EFTA States, and the application of the relevant implementing national legislation should not be overstated. It is important to remember that two Directives (97/5/EC and 98/26/EC) on payment intermediation which are based on the harmonisation provision of Article 100 a (now Article 95) of the Treaty of Rome, (which refers to Article 14 (ex Article 7a) of the Treaty), have already been incorporated into Annex IX to the EEA Agreement on financial services.

As far as these Directives are concerned, it cannot be seen that this difference between EC law and EEA law on payment intermediation has caused any particular problem of interpretation.[25] On the other hand, EU institutions, in particular the Commission and ECB, can be expected in the coming years to emphasize more the technical and legal harmonisation of various areas of payment intermediation and payment systems, with the aim of strengthening the euro as the common currency in the internal market. The status of new legislation in this field with respect to the EEA Agreement is open to dispute.

Payment intermediation and payment system policies of Community institutions

EU Member States had a deadline until the second half of 1999 to transpose the above Directives 97/5/EC and 98/26/EC.[26] The Commission and the ECB have underlined that care should be taken in implementing these Directives and various disputed opinions which have arisen in this respect are still being scrutinised. The Commission has officially published various results of this examination.[27] Amendments to the provisions of these Directives cannot be ruled out when further experience of their implementation has been gained.

On 4 January 1999 the ECB's real-time gross settlement system for the euro, TARGET, was introduced. The Euro Banking Association (EBA) has also developed the EURO 1 payment system for large payments in euro which are settled through a settlement account at the ECB. Payment systems of individual Member States, however, still differ widely and a harmonised retail payment system is still not at hand among them. Cross-border retail payments are therefore still tardy and costly.

Over the past decade the Commission, the European Parliament and the ECB have increasingly emphasised reducing the cost to consumers and businesses of cross-border money transfers. In connection with the adoption of euro notes and coins on 1 January 2002, it has been considered unacceptable that a higher charge is made for euro payments across borders than within them. Such inconsistency has been seen as an obstacle to the efficiency of the internal market and to public confidence in the euro. Political pressure has therefore grown on

24. Stefánsson, pp. 118-31.

25. However, it should be mentioned that Decision 1/98 of the EEA Joint Committee of 30 January 1998 states that the provisions of the Directive shall, for the purposes of the Agreement, be read with the adaptation whereby in Article 1 the words "currencies of the Member States" shall be replaced by "currencies of the Member States and of the EFTA States". Interpretation of this provision was needed to resolve the question whether the Swiss Franc, which is legal tender in Liechtenstein, was covered by the provisions of the Directive. For its part, the EFTA Surveillance Authority considered this to be the case and the Commission accepted that interpretation.

26. The deadline was 14 August 1999 for Directive 97/5/EC. A joint declaration of the European Parliament, the Council and the Commission, however, stated Member States' willingness to implement it no later than 1 January 1999. The deadline was 11 December 1999 for Directive 98/26/EC.

27. See http://europa.eu.int/comm/internal_market/en/finances/payment/-directives/index.htm. For the EFTA Surveillance Authority, see http://www.efta.int/structure/SURV/efta-srv.asp and select Databases – Use AIDA.

Community institutions to compel credit institutions in Member States to reduce this cost substantially.

The Framework for Financial Markets Action Plan[28] of 11 May 1999, endorsed by the Council and the European Parliament, calls for integrated retail payment systems that provide for secure and competitive small-value cross-border transfers. Subsequently, a communication from the Commission to the Council and the European Parliament on retail payments in the Internal Market was published on 31 January 2000, indicating the actions to be taken in order to create a "Single Payment Area" where citizens and SMEs can make small-value payments across borders nearly as easily and cheaply as they can within their own countries.

In spite of the introduction of the euro and the Commission's efforts, credit institutions as a rule have not seen their way to cutting their charges for performing cross-border payment orders. They have justified this by pointing out the different structures of retail payment systems in different Member States, which makes cross-border credit transfers costly.[29] Average cost to consumers of a cross-border retail payment has remained consistent at around 20 euros for a fairly long time. The failure to cut this cost can partly be attributed to the lack of competition between credit institutions in cross-border payment intermediation. Their failure to cut costs in implementing payment orders, on the other hand, can be traced to their lack of cooperation on harmonising payment systems. In November 2001 the ECB published a report, *Towards an integrated infrastructure for credit transfers in euro*, discussing technical reforms to systemic factors in payment systems that could reduce credit institutions' costs in implementing cross-border payment intermediation in euro.

The lack of success in this area eventually led to the adoption of *Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro.*[30] Like the abovementioned Directives 97/5/EC and 98/216/EC, the regulation is based on Article 95(1) (ex 100a) of the Treaty of Rome. According to the regulation, with effect from 1 July 2002, charges levied by an institution in respect of cross-border electronic payment transactions in euro up to EUR 12,500 shall be the same as the charges levied by the same institution in respect of corresponding payments transacted within the Member State. The same applies to cross-border credit transfers with effect from 1 July 2003. With effect from 1 January 2006 the amount is raised to EUR 50,000. The Regulation does not apply to cross-border payments made between institutions for their own account. In addition, the Regulation obliges institutions to inform a customer of the charges applied and to use an International Bank Account Number (IBAN) and Bank Identified Code (BIC). The Regulation also applies to cross-border payments made in the currency of another Member State when the latter notifies the Commission of its decision to extend the Regulation's application to its currency. At the time of writing it is not known when the UK, Denmark and Sweden will reach a decision in this respect.[31]

A single currency in the internal market, reduced charges for cross-border transfers in euro, shorter transfer time, greater transparency, consumers' right of redress, a more secure legal framework for payment systems and other points provided for in current EC law entail important steps in the formation of a Single Payment Area within the internal market. However, it should be borne in mind that these reforms have been brought about through coercive measures by Community institutions. A great deal of work remains to be done on creating various other conditions for collective intermediation of cross-border retail payments in Europe.

Underlying the Community's aim of establishing a Single Payment Area among the Member States is an extensive strategy embracing many aspects of payment intermediation.[32] Member States can be expected to give growing emphasis to harmonisation of payment intermediation infrastructures. The pay-

28. p. 11.
29. Regarding payment systems of different Member States, see the ECB report: Payment and Securities Settlement Systems in the European Union.
30. OJ L 344, 28.12.2001. p. 13.
31. It should further be pointed out that at the time of writing, the question of whether the Regulation will be incorporated into the EEA Agreement is being examined. For their part, the Commission and the EFTA Secretariat have informally regarded the Regulation as having EEA relevance.
32. Allix, pp. 337-59.

ment systems of individual countries still differ widely. It is expected that efforts will be made to institute a single retail payment system for the euro within Member States, or to harmonise individual national payment systems in such a way that they can function as a single, integrated system. Presumably, the Commission, the ECB and the EBA will collaborate on leading this development.[33]

At a meeting of an EU and EFTA group of payment systems government experts on 17 January 2002, the Internal Market DG presented a working document listing some issues that the Commission considered of importance for the Single Payment Area. The document was meant to launch a discussion on what should be done to enhance further the functioning of the Single Payment Area.

The document presents the viewpoint that a comprehensive and coherent piece of legislation in the field of payments is preferable to a piecemeal approach. The current provisions have been adopted somewhat arbitrarily to amend flaws in specific areas of payment intermediation. A coherent legal framework would serve to harmonise and simplify the rules and enhance legal certainty in this area. According to the principle of subsidiarity, new legislation should be restricted to factors that are more appropriate to Community law than national law. Taking into account the nature of cross-border payment intermediation, however, there is a need for collective rules in various fields. Likewise, an examination is needed of whether it is right to abandon the current approach of making a distinction between domestic and cross-border payment transactions. Payment intermediation in the euro zone would thereby be regarded as taking place in the domestic payment area. An attempt should also be made to evaluate the impact of new information and telecommunication technology on payment instruments and payment systems, with the aim of identifying the need for new legal provisions. The need to ensure a high degree of technical neutrality and flexibility in the legal framework is important. Increased legal and technical security in payment intermediation should also be emphasised.

These views on payment intermediation strategies are now being examined by the governments of the EU Member States.

The EEA context

The EFTA States need to take a standpoint towards the EU's targets for a Single Payment Area in the internal market and the rapid evolution that may be expected in payment legislation and infrastructure in the future. The following points can be considered:

Firstly, the EFTA States have participated in the work of the EU group of payment systems government experts which communicates legal and technological developments in this field. There, the EFTA States' representatives have an opportunity to explain the position of the EFTA States in this respect to the Commission and EU national representatives.

Secondly, it needs to be considered whether new Community legislation in the field of payments falls within the scope of the EEA Agreement and whether it should be incorporated into the Agreement. Paragraph 4 of the preamble to the Agreement states its aim of creating a dynamic and homogeneous European Economic Area based on common rules and equal conditions of competition. Article 102(1) of the Agreement states that, in order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to the Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation, with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement.

Generally speaking, any specific new Community legislation will be considered to have EEA relevance, with an obligation to incorporate it into the EEA Agreement, if it alters an earlier EEA Act which has already been incorporated into an Annex to the Agreement. If no such alteration to an earlier Act is involved, the importance of the new legislation for the objectives of the EEA Agreement needs to be assessed. As a rule it would be presumed that new legislation should be incorporated into the Agreement if it contributes to the homogeneity of the EEA and is based on the four freedoms, competition rules or cooperation outside the four freedoms in such a way as to fall within the given scope of an Annex or Protocol. The significance of new Comm-

33. The EBA, in fact, plans to phase in a retail system for the euro.

unity payment legislation for the EEA Agreement must be assessed in this light.

Particular mention must be made that the evolution of the internal market is a central objective behind increased harmonisation of payment intermediation in Community law. Hitherto, homogeneity must be seen as having been the guiding aim, since two Directives on payment intermediation, based on the legal harmonisation provisions of Article 100 a (now Article 95) of the Treaty of Rome, have already been incorporated into Annex IX to the EEA Agreement, as mentioned above.

Thirdly, when the EEA relevance of new Community legislation on payments is questionable, its incorporation into the EEA Agreement nevertheless needs to be considered. Such a standpoint would be based on there being grounds for increasing legal harmonisation between EFTA States and the EU Member States in this field. Such harmonisation may be desirable in order to prevent new Community legislation, which would otherwise not be incorporated into the Agreement, from reducing homogeneity in other fields of it, e.g. with respect to financial services, capital movements and consumer protection. Presumably, in such cases provision would need to be made for the special adoption of the act in question, in a decision by the EEA Joint Committee.

Fourthly, the EFTA States may, jointly or individually, decide unilaterally to adapt their national law or technical requirements to new payment legislation or standards adopted by the Community institutions when such measures are beyond the scope of the EEA Agreement.

Fifthly, the EFTA States could consider drawing up a strategy for economic and monetary integration connected with payment intermediation in Europe. Cooperation in this field is assumed in Article 46 of the EEA Agreement, as pointed out above.[34] Secure payment intermediation and payment systems are among the main objectives of the European Central Bank and are connected to its monetary policy in a wide sense. A similar aim applies to the Central Bank of Iceland and Central Bank of Norway.[35] Thus it is conceivable to seek closer cooperation by the EFTA States' central banks with the ECB on payment intermediation.[36]

The EFTA States need to consider participation by their payment systems in the work by the ECB and the EBA in developing and harmonising payment systems. No particular legal obstacles should hinder such cooperation. Under Article 22 of the Statute of the European System of Central Banks and of the European Central Bank, the ECB may make regulations to ensure efficient and sound clearing and payment systems not only within the Community but also with other countries. Furthermore, Article 23 states that the ECB may establish relations with central banks and financial institutions in other countries.

In this context it is especially important to explore the possibility for EFTA States to link their payment systems with the ECB's TARGET or other payment systems operating under the auspices of Community institutions. Restrictions have hitherto been imposed on such linkage. Various arguments can be put forward for the right of credit institutions authorised in the EFTA States to access to these payment systems via their national central bank:

a) The right to participate in Community payment systems serves to promote the homogeneity of the EEA, cf. Article 1 of the EEA Agreement. Such a right therefore supports the main objective of the Agreement.
b) As outlined above, harmonisation of payment systems is a key issue in both current and proposed Community legislation on payment intermediation. If EFTA States are to take an active part in the formulation of a Single Payment Area within the internal market, and thus extend it to the entire EEA, such a decision must imply that they acquire comparable authorisation to link up with the Community's payment systems to that of the EU Member States that have not adopted the euro.

34. The Article reads: "The Contracting Parties shall exchange views and information concerning the implementation of this Agreement and the impact of the integration on economic activities and on the conduct of economic and monetary policies. Furthermore, they may discuss macroeconomic situations, policies and prospects. This exchange of views and information shall take place on a non-binding basis."

35. No central bank operates in Liechtenstein.

36. Efnahags- og myntbandalag Evrópu - EMU, p. 68.

c) Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions[37] provides fundamental rules on activities of credit institutions across the borders of the EEA Member States. Money transmission services are one main element specified in the list of credit institutions' activities which are subject to mutual recognition in Annex I to the Directive. Credit institutions are therefore authorised to conduct cross-border payment intermediation services, on the grounds of either the right of establishment or the freedom to provide services. A precondition for a credit institution in country A being able to provide satisfactory payment intermediation services in country B is that it is granted full access to a suitable payment intermediation system in country B. It can be inferred from the four freedoms and Directive 2000/12/EC that credit institutions are entitled to access to payment systems in other EEA States if such access is a precondition for them to be able to take advantage of their right to provide services on the same competition principles that apply to other credit institutions.

d) One aim of EU and EEA law on financial services is to create equal conditions of competition between credit institutions.[38] Discrimination with respect to credit institutions' authorisation to link up with common payment systems within the Community must be seen as conflicting with that aim. The Commission has issued a Notice on the application of the EC competition rules to cross-border credit transfers.[39] The EFTA Surveillance Authority has issued a corresponding Notice.[40] The notice, *inter alia*, stipulates provisions on participation by credit institutions in payment systems. Paragraph 24 of the Notice states that where a cross-border credit transfer system constitutes an "essential facility" it must be open for further membership provided that candidates meet appropriate membership criteria. Under paragraph 25, membership criteria must be objectively justified. The criteria may, for example, lay down requirements for members concerning their financial standing, technical or management capacities, and compliance with a level of creditworthiness. The Commission has examined a number of cases which put the application of the notice to the test.[41] Furthermore, the Commission has stated its view that the competition provisions of paragraph 1 of Art. 81 (ex 85) of the Treaty of Rome apply to interbank payments and payments involving bank customers in TARGET.[42] As for access to TARGET, the ECB has issued a Guideline which includes conditions for system access.[43] According to this, access by EFTA credit institutions to the system is only possible through the RTGS of a central bank of one of the 12 EU Member States that have adopted the euro, though without necessarily having established a branch in the host Member State.[44] Access is therefore not possible through an RTGS of a central bank in an EFTA state.

Conclusion

The above examination considers the provisions in EEA law on which Icelandic payment intermediation law is founded. The difference between EC law and EEA law in this field has been addressed. Furthermore, an account has been given of the payment intermediation policies that EU institutions have announced and how EFTA States could arrange their cooperation with them in the future.

EU institutions have set themselves the lofty aim of establishing a Single Payment Area in the internal market. Purposeful action towards achieving this aim can be expected over the next few years, involving both new legislation and harmonisation of payment intermediation infrastructures in Europe.

Apart from the legal obligation to implement rules concerning the internal market, and to maintain

37. OJ L 126, 26.5.2000, p. 1.
38. See, e.g. recital 5 of the preamble to Directive 2000/12/EC.
39. OJ C 251, 27.9.1995, p. 3.
40. Notice of the EFTA Surveillance Authority concerning the application of the EEA competition rules to cross-border credit transfers of 4 June 1997.
41. Gyselen, pp. 359-62.
42. Report XXVII on Competition Policy 1997, p. 34.
43. Guideline of the European Central Bank of 26 April 2001 on a Trans-European Automated Real-time Gross Settlement Express Transfer System (Target). OJ L 140, 24. 5. 2001, p. 72.
44. cf. the concept "remote access".

the homogeneity of the EEA, Iceland's participation in the ongoing evolution of payment intermediation will serve to promote the security of Icelandic payment systems and the efficiency of its financial markets, for the benefit of financial institutions, investors and consumers alike. Hence, Icelandic authorities and those of other EFTA States may be expected to see it as serving their interest to strengthen cooperation in this field, even beyond what may directly be inferred from their obligations under the EEA Agreement.

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