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Legal aspects of credit transfers and electronic payments: a Belgian perspective

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Legal aspects of credit transfers and electronic payments: a Belgian perspective

Abstract

This paper will discuss several legal issues regarding credit transfers and the electronic payment instruments most often used in Belgium, i.e. debit cards and credit cards. More specifically the following questions will be addressed: who is liable in case of late or erroneous execution of a payment transaction, who bears the risk in case of fraud, when does payment take place and is it possible to revoke a payment transaction, once it has been initiated? In answering these questions we will not only take into account the Belgian legislation as it exists today, but we will also refer to the European Directive on Payment Services in the Internal Market which has to be transposed by 1 November 2009 and that will change the Belgian legislation considerably on a few points.

Introduction

1. Today, most payments in Belgium are made by credit transfers (initiated electronically or in writing) or (other) electronic payment instruments. Contrary to what is the case in the United States, cheques are not used very often anymore. Also, the use of cash is decreasing. This paper will discuss several legal issues regarding credit transfers and the electronic payment instruments most often used in Belgium, i.e. debit cards and credit cards. More specifically the following questions will be addressed: who is liable in case of late or erroneous execution of a payment transaction, who bears the risk in case of fraud, when does payment take place and is it possible to revoke a payment transaction, once it has been initiated?

In answering these questions we will not only take into account the Belgian legislation as it exists today, but we will also refer to the European Directive on Payment Services in the Internal Market[1] which has to be transposed by 1 November 2009 and that will change the Belgian legislation considerably on a few points.

Chapter 1: Scope of application of the existing legislation

2. Today two legal acts in Belgium deal with payments made by credit transfers or electronic payment instruments: the Act of 9 January 2000 on cross border credit transfers and payments[2], transposing the European Directive on cross-border credit transfers[3] and the Act of 17 July 2002 concerning transactions executed with instruments for the electronic transfer of funds[4]. With the latter Act the Belgian legislator, although not obliged to do so[5], transposed the 1997 European Recommendation concerning transactions by electronic payment instruments[6]. Before dealing with the rules incorporated in these Acts, it is necessary to have a look at the scope of application of these legal acts, which both aim at protecting the originator of a payment transaction.

§ 1 The Act of 9 January 2000

3. The Act of 9 January 2000 only applies to cross-border credit transfers in euro or in the currency of a Member State, up to the equivalent of 50.000 € (art. 2). Therefore the Act of 9

[1] Directive 2007/64/EC of the European Parliament and the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7/EC,2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, *OJ L.* 319, 5 December 2007. See for example: S. KIERKEGAARD, "Payments in the Internal Market and the New Legal Framework - EU Law: Harmonising the Regulatory Regime for Cross-Border Payment Services", *Computer Law & Security Report*, Vol. 23, No. 2, pp. 177-187; M. VANDEN BOSCH & N. MATHEY, "Le Marché unique des services de paiement en Europe", *Revue de droit bancaire et Financier* 2007, p 59-70.

[2] *Moniteur* 9 February 2000. See for example: M. VAN HUFFEL, "Moyens de paiement et protection du consommateur en droit communautaire et en droit belge", *Revue du droit de la consommation* 2000, nr. 47, xxx.

[3] The Directive on cross-border credit transfers will be repealed with effect from 1 November 2009.

[4] *Moniteur* 17 August 2002. See for example: M. GUSTIN, "La loi du 17 juillet 2002 relative aux opérations effectuées au moyen d'instruments de transfert électronique de fonds", in C. BIQUET-MATHIEU (ed.), *Contrats à distance et protection des consommateurs*, Luik, CUP, 2003, 183-227 ; T. LAMBERT, "La loi du 17 juillet 2002 relative aux opérations effectuées au moyen d'instruments de transfert électroniques de fonds", *Revue du droit commercial*2002, 573-588.

[5] Contrary to a Directive a Recommendation is not a binding instrument.

[6] Recommendation 97/489/EC of 30 July 1997 concerning transactions carried out by electronic payment instruments and in particular the relationship between holder and issuer, *OJ L.* 208, 2 August 1997, 52.

January 2000 will for instance not be applicable to an order which is given in US Dollar or Japanese Yen, neither to an order which exceeds 50.000 €.

A credit transfer is defined as a transaction carried out on the *initiative of an originator* via an institution with a view to making available an amount of money to a beneficiary at an institution (art. 3). The Act of 9 January 2000 does not apply to other cross-border payments, for example by checks, debit cards or credit cards[7].

To determine whether a credit transfer has a cross-border nature, one has to look at the place where the institution (or the branch) of the originator and the institution (or the branch) of the beneficiary are established (art. 3). The residence or nationality of the originator or beneficiary is not relevant[8]. Only when the institutions of the originator and beneficiary are established in different Member States the Act of 9 January 2000 will apply. It is clear that the Act is not applicable to domestic credit transfers. Also, the Act does not apply to all cross border credit transfers. If a client, who holds his account at a Belgian financial institution, instructs his bank to credit the account of a person, holding his account at a bank in Canada, the regime incorporated in the Act of 9 January 2000 is not applicable.

4. Apart from that, it is not relevant whether the credit transfers are initiated in writing or electronically or whether the order is given by a consumer or a professional[9].

§ 2 The Act of 17 July 2002

5. The Act of 17 July 2002 applies to instruments for the electronic transfer of funds (hereafter electronic payment instruments), being instruments that enable the holder of such instrument to transfer funds partly or completely electronically (art. 2). Looking at the definition of an electronic payment instrument one might think that credit transfers that are initiated in writing but processed electronically at the interbank level fall under the scope of the Act. However, one must take into account article 3 of the Act which explicitly excludes certain transactions from the scope of application, including payments that are initiated in writing. Therefore one can argue that the Act only applies to payment transactions initiated electronically. There is no limitation with regard to the amount of the transaction.

Not every person using an electronic payment instrument enjoys the protection offered by the Act of 17 July 2002. The Act only protects the "holder" of an electronic payment instrument, being every physical person that holds an electronic payment instrument following an agreement concluded with the issuer of such instrument (art.2). Legal persons will therefore not be able to invoke the provisions of this Act. Professionals are protected in the same way as consumers, as long as they are not legal persons.

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[7] X. FAVRE-BULLE, *Les Paiements transfrontières dans un espace financier européen*, Basel, Helbing & Lichtenhahn, 1998, 171; O. HANCE and S. DIONNE BALZ, *The New Virtual Money: Law and Practice*, The Hague, Kluwer Law International, 1999, 193-194.

[8] D. DEVOS, "Les virements transfrontaliers: analyse de la directive européenne 97/5 du 27 janvier 1997, *Revue bancaire et financière* 1998, 49.

[9] The Act of 9 January 2000 however does not apply to credit transfers ordered by credit institutions, financial institutions or other institutions that in the course of their business execute cross-border credit transfers.

§ 3 The European Directive on Payment Services in the Internal Market

6. The rules on late or erroneous execution of credit transfers and on fraudulent use of payment instruments are incorporated in Title IV of the European Directive on Payment Services in the Internal Market. Title IV of the Directive applies to payment transactions *in euro or in the official currency of a Member State* consisting in the act of depositing, withdrawing or transferring funds from the payer to the payee (art. 2). Transfers initiated by the payer (e.g. credit transfer), as well as transfers initiated by the payee (e.g. direct debit) fall under the scope of application of the Directive. In principle - and contrary to what is the case under the Act of 17 July 2002 - it is irrelevant whether the payment order is given electronically or in writing[10].

However the provisions of Title IV do not apply to all payment transactions in euro or in the official currency of a Member State. It only applies where both the payer's payment service provider and the payee's payment service provider are located in the Community (art. 2). So if a German payment service user instructs his financial institution, located in Germany, to credit the account of a beneficiary maintaining his account at a financial institution in Canada, the rules incorporated in Title IV will not be applicable. However, contrary to what is the case under the Act of 9 January 2000, it is not necessary that the payment service providers are established in a *different* Member State. Domestic payment transactions taking place within one Member State are also covered by the Directive. Also there is no limitation with regard to the amount of the transaction.

7. One of the objectives of the Directive is to protect the so-called "payment service user", being every natural or legal person who makes use of a payment service in the capacity of either payer (i.e. the natural or legal person who has the right of disposal of funds and who allows them to be transferred to a payee) or payee (i.e. the natural or legal person who is intended to be the final recipient of funds which have been the subject of a payment transaction) (art. 4)[11]. So, contrary to the Act of 17 July 2002, the regime basically protects natural persons as well as legal persons, consumers as well as professionals[12]. However, if the payment service user is not a consumer, the parties can agree in the framework contract that certain rules – for example the rules which determine liability in case of defective execution – do not apply (art. 51). It is to be expected that payment service providers will use this possibility to agree otherwise widely. But in this context it must be emphasized that the Directive enables Member States to determine that micro enterprises[13] must be protected in the same way as consumers.

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[10] However, the Directive does not apply to all transactions that are initiated in writing, as some transactions are explicitly excluded from the scope of the Directive (art. 3). Especially it is worth mentioning the exclusion of transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee: Paper cheques, paper-based vouchers (e.g. transactions with a credit card, in which the credit card is not identified electronically and the holder simply is asked to sign a voucher), paper-based traveller cheques and paper-based promissory notes.

[11] So if the term "payment service user" is used in the Directive, the rule aims at protecting the payer as well as the payee. On the contrary, when a provision only concerns one of the parties of the underlying relation, the Directive uses the term "payer" or "payee".

[12] The Directive does not apply to payment transactions carried out between payment service providers, their branches or their agents, for their own account (art. 3, m).

[13] See art. 1 and 2 (1) and (3) of Title I of the Annex to Recommendation 2003/361/EC in the version of 6 May 2003.

8. In conclusion, it is clear that the scope of application of the new Directive is much broader than the scope of application of the existing Belgian legislation.

Chapter 2. Late and erroneous execution of payment transactions

§1 Late execution of payment transactions

A. The Act of 9 January 2000

9. Rules on late execution are scarce in Belgium. The only *explicit* rules that exist are incorporated in the Act of 9 January 2000 on cross border credit transfers and payments. According to article 7 of the Act a distinction must be made between the obligations of the originator's institution and the obligations of the beneficiary's institution. The institution of the originator is obliged to execute the cross-border credit transfer (this means to credit the account of the beneficiary's institution) within the time limit agreed with the originator[14]. In the absence of any such time limit, the institution of the originator must ensure that the funds have been credited to the account of the beneficiary's institution at the end of the fifth banking business day (every business day on which all institutions involved in the transfer perform their normal activities) following the date of acceptance of the cross-border credit transfer, no matter the number of banks involved in the transfer.

In order to find out when exactly the execution time determined by the legislator starts, one needs to define the concept of the "date of acceptance". The date of acceptance means the date of fulfilment of all the conditions required by the institution as to the execution of the cross-border credit transfer order and relating to the necessity to have adequate financial cover available. It is clear that the term "acceptance" does not refer to the intention to accept[15] and the execution time will start running as soon as the bank receives the order containing all necessary information to execute the transaction (as far as sufficient funds or a credit line are available).

It is important to stress that the Act of 9 January 2000 allows financial institutions to agree with their customers on an execution time that is longer than the one incorporated in the Act, i.e. exceeding five banking business days.

It is clear that the credit transfer is not fully accomplished when the account of the beneficiary's institution is credited. Therefore, the beneficiary's institution is obliged to credit the account of the beneficiary within the time limit agreed with the beneficiary. In the absence of any such time limit, the beneficiary's institution should credit the account of the beneficiary 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.

10. If the institutions involved do not respect these time limits and the delay cannot be attributed to the originator or the beneficiary, the originator's institution, respectively the beneficiary's institution must pay a compensation, which comprises the payment of an interest. It is clear that this compensation will not always indemnify the originator (or

[14] Unless it does not wish to do business with that customer, an institution must at a customer's request, for a cross-border credit transfer with stated specifications, give an undertaking concerning the time needed for execution of the transfer.

[15] O. HANCE and S. DIONNE BALZ , *The New Virtual Money: Law and Practice*, The Hague: Kluwer Law International, 1999, 196.

beneficiary) sufficiently, especially in the case of consequential damages[16]. However, it is accepted in Belgium that consequential damages must not be compensated unless the parties agreed otherwise before the execution of the credit transfer[17].

B. The Act of 10 July 1997 on the value date of banking transactions

11. Article 5 of the Act of 10 July 1997[18] determines that in case of a domestic credit transfer between an originator and a beneficiary holding their account at the same bank, the debit of the originator's account and the credit entry of the beneficiary's account must take place on the same day. When the originator and the beneficiary hold their account at a different financial institution the credit entry of the account of the beneficiary must take place at the latest at the end of the banking business day following the day on which the originator's account was debited. It is clear that these rules do not oblige a financial institution to execute domestic credit transfers within a certain period of time since they do not determine when the account of the originator must be debited. This might take several days.

C. No specific legislation applies

12. If no specific rules apply to the duration of the execution time, i.e. if the Act of 9 January 2000 is not applicable, general principles of contract law have to be applied. If the parties did not agree on the duration of the execution time, the originator will have to prove that the payment order was executed too late taking into account normal banking practices. He will also have to prove that the late execution was due to a mistake of the financial institution.

Domestic payment transactions are in Belgium processed in a very efficient way, using a settlement system at the National Bank. Large orders (>500.000 €) are processed in real time, meaning that large amounts can be transferred within a few seconds (real time gross settlement). Small orders (credit transfers, but also payments by debit card) are settled once a day on a net basis (deferred net settlement). If the bank of the originator, in case of a credit transfer, transmits the information it receives from the originator on the same day to the settlement system, the account of the beneficiary will be credited at the latest at the end of the next day or the day thereafter. So late execution of domestic payment transactions will only occur if the bank of the originator does not take the steps necessary to process the order in due time, in which scenario it can be held liable (but in principle not for consequential damages).

D. The impact of the European Directive on Payments in the Internal Market

13. The implementation of the Directive on Payment Services in the Internal Market will change the Belgian regulation radically. Before having a look at the rules on the duration of the execution time itself, it is necessary to indicate that the scope of application of Title IV of the Directive is further narrowed as far as the rules on the time of execution are concerned.

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[16] This is for example the case when a delayed payment leads to the loss of an option or to the coming into force of a damage clause. See for an example: Evra Corp. v. Swis Bank Corp. See also: J. MCCARTHY, "U.C.C. Article 4A - Wire or wire not? Consequential Damages under article 4 A and a critical analysis of Evra v. Swiss Bank", *Comp. Law. Journ.* 1991-1992, 341-369; R. EFFROS, "A Primer on Electronic Fund Transfers", *The Law of International Trade Finance*, N. HORN (ed.), Deventer, Kluwer Law and Taxation Publishers, 1989, 172-176.

[17] R. STEENNOT, *Elektronisch betalingsverkeer: een toepassing van de klassieke principes*, Antwerpen, Intersentia, 2002, 499.

[18] *Moniteur* 8 August 1997.

1. Scope of application

14. The rules concerning the time of execution are only mandatory with regard to 1) payment transactions *in euro* which fall under the scope of Title IV (domestic or cross-border), 2) *domestic* payment transactions in the *official currency of the Member State concerned* (e.g. a credit transfer in Danish Crone between a payer and a payee having their account in Denmark) and 3) payment transactions involving only one currency conversion between the euro and the currency of a non-euro Member State, provided that the currency conversion is carried out in the non-euro Member State and the cross-border transfer (if any) takes place in euro (art. 68). With regard to these transactions, contractual derogations are impossible.

However, this does not mean that the rules on the time of execution cannot apply to other payments which fall under the scope of Title IV of the Directive (e.g. a cross border credit transfer initiated by a payer in Belgium, asking his payment service provider to credit the Danish beneficiary's account with an amount in Danish Crone, currency conversion taking place in Belgium). On the contrary, they will apply automatically, unless otherwise agreed. However it is to be expected that payment service providers will include a clause which excludes explicitly the rules of the Directive from applying to these kind of transactions in the framework contract governing the relation with the payment service user. In this context it is important to mention that the possibility to agree otherwise not only exists when the contract is concluded with a professional, but also when it is concluded with a consumer. In any case, even if it is possible to agree otherwise the time of execution of *intra community* payment orders can never exceed 4 business days (art. 68).

2. Duration of the execution time

15. According to the new Directive the payer's payment service provider must ensure that, after the point in time of receipt of the order, the ordered amount is credited to the payee's payment service provider's account at the latest at the end of the next business day. However up to 1 January 2012 a payer and his payment service provider may agree on a longer execution time, which may however not exceed three business days (or four business days if the order is initiated on paper) (art. 69).

As the execution time is calculated in function of the "receipt" of the order, it is important to determine this point in time. The point in time of receipt is the time when the payment order is actually received by the payer's payment service provider (art. 64). However, the payment service provider may establish a cut-off time near the end of a business day (e.g. 4.00 PM) beyond which any payment order received will be deemed to have been received on the next business day. If the time of receipt is not a business day, the order will be deemed to have been received on the next business day. As is the case under the Belgian Act of 9 January 2000 no formal acceptance of the order is needed in order to start the time of execution to run. The mere receipt of the order obliges the payer's payment service provider to credit the account of the payee's payment service provider, at least when the authorised order meets all the conditions set out in the framework contract (i.e. when there are sufficient funds available on the payer's account to execute the order and the order contains all the details required to be able to be executed (e.g. unique identifier)). If the order does not meet all the conditions set out in the framework contract and therefore the payment service provider refuses to execute the order, the payment service provider must notify its refusal to execute the order within the time frame determined in the Directive (art. 65).

It is clear that the payment transaction is not fully completed when the amount is received by the payee's payment service provider. That is why the Directive also creates obligations for the payee's payment service provider. More specifically, the payee's payment service provider must put the amount at the payee's disposal immediately after the amount has been credited to the account of the payee's payment service provider itself (art. 69). The credit value date of the payee's account must be the business day at which the amount of the payment transaction is credited to the payee's payment service provider's account (art. 73).

16. As indicated these rules apply to cross-border payments as well as to domestic payments. However, for purely national payment transactions Member States may provide for shorter maximum execution times (art. 72). This rule will especially be relevant up to 2012. For example, Member States can determine that, as far as domestic payments are concerned, it is not possible to agree on an execution time of three business days up to 2012. Taking into account the way the systems in Belgium work today, the Belgian legislator could consider to use this rule and for example to determine a maximum execution time of two business days.

17. It is clear that the new Directive will decrease execution times for cross border payments dramatically, since from 1 January 2012 cross-border payments in euro within the Community will have to be processed within one business day. In practice such decrease will only be possible when efficient settlement systems are employed which make it possible to process cross-border payments in euro in the same way as domestic payments are settled in Belgium today. More specifically, it will no longer be possible to execute payment transactions using several corresponding banks, which is still common today[19].

There is no doubt these rules benefit enterprises involved in international trade. At first sight these rules also seem very interesting for the individual consumer. However, one must take into account that the installation of efficient cross-border settlement systems will create a lot of costs which will eventually have to be borne by the payment service user. Taking into account the small amount of cross-border payment transactions that are performed by consumers today, such stringent rules seem to imply more disadvantages (higher cost of payment transactions) than advantages for consumers (in most cases consumers don't care whether the account of the payee is credited within one or four banking days). The most important for consumers is that they are informed about the execution time, so they are able to initiate the transaction in due time.

§2 Erroneous execution of payment transactions

18. The rules on erroneous or defective execution mentioned below apply when the account of the beneficiary is not credited (with the amount ordered). It speaks for itself that the question on liability, in the relation between the originator or beneficiary and the financial institution, will only arise in case the money cannot be recovered form the person whose account was credited by mistake. Indeed, in case the account of a third person is credited, the financial institution can recover the money on the basis of the theory of undue payment, in Belgium even if the person whose account was credited mistakenly has a claim against the

[19] M. BRINDLE & R. COX, "Introduction", in M. BRINDLE & R. COX (ed.). *The Law of Bank Payments*, London, Sweet & Maxwell, 1999, xxx.

originator[20]. So the question of liability will only arise if that third person has disappeared or gone bankrupt.

A. The Act on cross-border credit transfers

19. According to article 9 of the Act of 9 January 2000 the originator's institution must credit the originator's account with the amount of the cross-border credit transfer (plus interest and charges relating to the transfer) if the amount of the cross-border credit transfer - which has been accepted by the originator's institution – is not credited to the account of the beneficiary's institution. The amount must be made available to the originator within fourteen banking business days following the date of the originator's request, unless in the meantime the funds corresponding to the cross-border credit transfer have been credited to the account of the beneficiary's institution. It is clear that the originator's institution must credit the originator's account whether or not it (or an intermediary institution) has made a mistake[21]. This regime is very advantageous for the originator, in particular in a cross-border context. However, it is important to stress that the liability of the originator's institution is limited to 12.500 €[22].

When the originator's institution has compensated the originator and defective execution was due to another institution, the latter must compensate the originator's institution for the sums paid to the originator.

It is also important to emphasize that there exist some exceptions to this basic rule: if the cross-border credit transfer was not completed because of its non-execution by an intermediary institution chosen by the beneficiary's institution, the originator's institution will not be held liable. It is the beneficiary's institution that will be obliged to make the funds available to the beneficiary (art. 9). If the cross-border transfer was not completed because of an error or omission in the instructions given by the originator or by an intermediary institution expressly chosen by the originator, the originator's institution and the other institutions involved must only endeavour *as far as possible* to refund the amount of the transfer (art. 9). Finally, the financial institution cannot be held liable in case of *force majeure* (infra nr. 22).

20. It is strange to see that the Act applies to cross border credit transfers up to 50.000 €, but liability is limited to 12.500 €. If the originator of a cross border credit transfer suffers additional damages (for example when the amount of the transfer exceeds 12.500 €), he can only recover these additional losses on the basis of the general principles of civil law. In Belgium, this means that the originator will have to prove that his institution, the beneficiary's institution or an intermediary institution has acted negligent. Moreover, if the non-execution of the credit transfer is not caused by the originator's institution, the originator will normally not have a claim against his own institution. This is due to the fact that the courts analyse a credit transfer as an agency[23]. The originator's bank is considered to act as an agent of the

[20] A. BRUYNEEL, "Le virement", in *La banque dans la vie quotidienne*, Brussel, Editions du jeune barreau, 1986, 419 and 423.
[21] Each intermediary institution, which has accepted the cross-border credit transfer order, owes an obligation to refund at its own cost the amount of the credit transfer, including the related costs and interests to the institution which instructed it to carry out the order (art. 8. 1).
[22] D. DEVOS, "Les virements transfrontaliers: analyse de la directive européenne 97/5 du 27 janvier 1997, *Revue bancaire et financière* 1998, 53.
[23] Mons 25 September 1984, *Revue du droit commercial* 1985, 686; Brussels 18 December 1987, *Revue du droit commercial* 1989, 788; A. BRUYNEEL, "Le virement", in *La banque dans la vie quotidienne*, Brussel, Editions du

originator. All other banks involved in the transfer, including the bank of the beneficiary, act as substituted agents[24]. All of this means that article 1994 of the Civil Code has to be applied, which states that, as far as substitution is permitted, the agent is not liable, at least not in principle, for the mistakes made by the substituted agents. Since the general terms and conditions of bank determine that substitution is possible, the originator will in principle not have a claim against his own bank. Only if his bank has chosen an incompetent bank to carry out the transaction, the originator's institution can be held liable[25].

However this does not mean that the originator does not have a claim at all. According to article 1994 of the Civil Code the principal has a direct claim against the substituted agent that made a mistake or acted negligently, the main disadvantage here clearly being that the substituted agent might be located in another country and no contractual ties exist between the originator and this bank.

21. Authors have criticized the fact that the liability of the financial institutions is limited to 12.500 €[26]. There are no good reasons for limiting liability to 12.500 € in case the amount of the credit transfer is higher than 12.500 € and lower than 50.000 €. It was alleged by the European legislator that a greater liability might have a prejudicial effect on solvency requirements, which are imposed on financial institutions[27]. This argument is not persuasive, on the one hand because sound financial institutions should be able to cope with such a liability, on the other hand because the Directive enables the originator to recover additional damages based on general principles of civil law.

22. As already indicated the originator's institution or beneficiary's institution cannot be held liable in case defective or non-execution is due to *force majeure*. Particularly interesting is the question whether system malfunctions can be regarded as *force majeure*. It is widely accepted that a mere system malfunctioning cannot be seen as *force majeure*. The question whether a system malfunctioning constitutes *force majeure* must be determined by analyzing the measures an institution has taken to avoid damages resulting from a system malfunctioning[28]. The institution invoking *force majeure* will have to prove that the malfunctioning was beyond its control and that it was impossible to avoid the consequences of the malfunctioning, *although it had sufficient back-up procedures in place*.

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jeune barreau, 1986, 414; H. DE PAGE, *Traité élémentaire de droit civil belge*, T. III, Brussel, Bruylant, 1967, 608.

[24] Mons 2 December 1987, *Droit de la Consommation* 1989, 52, noot M. ANTOINE, "Questions de responsabilité soulevées par l'exécution d'un ordre de virement erronément libellé"; Mons 14 May 1987, *Revue du droit commercial* 1989, 58, noot M. REGOUT-MASSON; Brussels 30 April 1980, *Revue bancaire et financière* 1981, 209, noot A. BRUYNEEL; A. BRUYNEEL, "Le virement", in *La banque dans la vie quotidienne*, Brussel, Editions du jeune barreau, 1986, 380-381; G.A. DAL en I. CORBISIER, "Les instruments de paiement et de crédit (1980-1989)", *Journal des Tribunaux* 1990, 440; D. DEVOS, "Les effets externes des conventions en matière financière", in *Le contrat et les tiers*, *les effets externes et la tierce complicité*, Brussel, 1995, 197.

[25] Since the bank of the originator cannot choose the bank of the beneficiary it can never be held liable for the mistakes made by the bank of the beneficiary : P. PETEL, *Les obligations du mandataire*, Parijs, Litec, 1988, 210.

[26] X. FAVRE-BULLE, *Les Paiements transfrontières dans un espace financier européen*, Basel, Helbing & Lichtenhahn, 1998, 292-293 and 295.

[27] Consideration 11 of the Directive on cross border credit transfers.

[28] F. BERKLEY, "Computerized Check processing and a bank's duty to use ordinary care", *Texas Law Review* 1987, 1192; V.J. BROWN, "Some current litigation issues arising from the use of computer systems in the rendering of financial services", *Computer Law & Practice*, 1988, 119; D. EINSELE, "Das neue Recht der Banküberweisung", *Juristenzeitung* 2000, 15; C. REED, *Electronic Finance Law*, Londen, Woodhead Faulkner, 1991, 20-21; X. THUNIS, "Tendances récentes de la responsabilité des banques dans les opérations de transferts électroniques de fonds", *Revue de droit des affaires internationaux* 1991, 954, 967

Further the question arises whether the insolvency of an intermediary institution constitutes *force majeure*. Whereas some authors argue that the insolvency of an intermediary institution always constitutes *force majeure*, other authors believe that the insolvency of the intermediary institution never constitutes *force majeure*[29]. We think one has to find out whether the insolvency of the intermediary institution was foreseeable for the originator's institution, i.e. whether the originator's institution has acted slightly negligent by choosing the intermediary institution as correspondent[30]. If it should have foreseen the insolvency, it should be liable for the non-execution of the transfer. If not, the insolvency constitutes *force majeure*.

Finally the question arises whether *force majeure* should exempt the financial institution from liability. Taking into account the general principles of civil law, we believe that force majeure should not exempt the financial institution from liability. Indeed according to the general principles of civil law the debtor of a money obligation cannot be exempted from its obligations by invoking *force majeure* (*genera non pereunt*)[31]. Furthermore, isn't a financial institution better placed to cope with the risk of *force majeure* than the originator, especially when it is a consumer?

B. The Act of 17 July 2002

23. Article 8 of the Act of 17 July 2002 determines that the issuer of an electronic payment instrument is liable for the non-execution or defective execution of a transaction with an electronic payment instrument, initiated at a device or terminal or through equipment that has been authorised for use by the issuer, even if that device or terminal is not under the issuer's direct control.

The issuer can only escape liability:

- when the holder has initiated the transaction at a device or terminal or through equipment, which is not authorized for use by the issuer[32] (for example when the holder uses a cellular phone that is not on the list of phones one can use in order to initialise credit transfers), or
- when the holder has not fulfilled his obligations, a rule which is interpreted very broadly implying for example that the issuer cannot be held liable when the holder has filled in a wrong account number.

In all other cases, the issuer remains liable even when the defective execution is due to *force majeure*. Furthermore, it does not matter whether the issuer himself or a third party (e.g. intermediary financial institution, telecommunication operator) caused the defective execution[33] or whether or not the terminal is under the issuer's direct or exclusive control[34]

[29] D. DEVOS, "Les virements transfrontaliers: analyse de la directive européenne 97/5 du 27 janvier 1997", *Revue bancaire et financière* 1998, 53-54. Zie ook: D. EINSELE, "Das neue Recht der Banküberweisung", *Juristenzeitung* 2000, 15.
[30] H.J. VOLLRATH, *Die Endgültigkeit bargeldloser Zahlungen*, Berlijn, Walter de Gruyter, 1997, 216-218.
[31] G.A. DAL, "Nature juridique du compte de dépôt à vue", in *Mélanges Roger Dalcq. Responsabilités et assurances*, Brussel, Larcier, 1994, 64-65.
[32] A. SALAÜN, "Les paiements électroniques et la vente à distance: vers une sécurisation des paiements électroniques", *Journal de Tribunaux du Droit Européen* 1998, 135.
[33] X. THUNIS, *Responsabilité du banquier et automatisation des paiements*, Namur, Presses Universitaires, 1996, 264.

(so it is irrelevant whether the holder initiates the transaction on a terminal in the office of the issuer, on a terminal in a shop or on his personal computer) [35]. The issuer is even liable if the wrongful execution is due to the transmission of the payment order from the personal computer of the holder to the computer of the financial institution.

24. Article 8 of the Act of 17 July 2002 does not indicate when a payment transaction is executed correctly. Is this at the time when the financial institution of the beneficiary has credited the beneficiary's account or at the time when the account of the beneficiary's institution is credited, as is the case in the Act on cross-border credit transfers? The question raised is very important, as it determines whether the issuer is liable for the defective execution due to the beneficiary's institution. One could argue that the issuer should be liable until the moment that the beneficiary's institution has credited the beneficiary's account. First, this solution gives the most extensive protection to the holder. Second, it is more compatible with the theory, accepted by the majority, with regard to the moment of payment (infra nr. 57).

C. Incorrect account number

25. The strict liability which is incorporated in the Acts of 9 January 2000 and 17 July 2002 does not apply in case wrongful execution is due to the filling in (in writing or electronically) of a wrong account number. If the originator did not only mention the (incorrect) beneficiary's account number, but also the beneficiary's name (and address), the question arises whether the bank of the beneficiary has the obligation to verify whether the account number and the name of the beneficiary refer to the same person. Neither the Act of 9 January 2000, neither the Act of 17 July 2002 deal with this question, which implies that general principles of civil law have to be applied.

In Belgium banks have agreed on the interbank level that the beneficiary's bank must only verify whether the name and the account number refer to the same person if the amount of the credit transfer exceeds 10.000 €. In the relation between banks this agreement is binding, but the questions are: 1) can individual clients invoke these agreements against a bank executing an order exceeding 10.000 €, but not verifying whether the account number and the beneficiary's name refer to the same person and 2) can a bank executing an order below 10.000 € invoke the interbank agreement to prove that it did not do anything wrong?

There is practically no discussion with regard to orders exceeding 10.000 €. It is accepted by the courts that a bank, violating the interbank agreements can be held liable by the originator of the credit transfer[36]. Off course, not being a party to the interbank agreement, the originator cannot invoke this agreement directly, but the violation of the interbank agreement proves the bank acted negligently towards the originator[37]. Off course, the originator has also made a mistake. Nevertheless, the bank is held liable for the full amount of the transaction, because

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[34] So it is irrelevant whether the holder initiates the transaction on a terminal in the office of the issuer or on a terminal in a shop: X. FAVRE-BULLE, *Les Paiements transfrontières dans un espace financier européen*, Basel, Helbing & Lichtenhahn, 1998, 275.

[35] X. FAVRE-BULLE, *Les Paiements transfrontières dans un espace financier européen*, Basel, Helbing & Lichtenhahn, 1998, 275.

[36] Antwerp 3 October 2002, *Rechtskundig Weekblad* 2003-2004, 1307, note; Antwerp 26 October 1993, *Tijdschrift Notariaat* 1994, 79; Chamber of Commerce Antwerp 12 November 1991, *Tijdschrift Notariaat* 1992, 137.

[37] D. DEVOS, "Les effets externes des conventions en matière financière", in *Le contrat et les tiers, les effets externes et la tierce complicité*, Brussel, 1995, 218-220.

the courts believe that the bank's mistake cuts the causal link between the originator's mistake and the damages.

Much more difficult is the question whether the bank, executing an order below 10.000 €, can prove that it did not act negligently by invoking the interbank agreement. Does the respect of the interbank agreement automatically imply the bank did not act negligently? If the bank has incorporated the interbank agreement in the contractual relation with its client by referring to the interbank agreement in the contractual terms and conditions there is no doubt that the bank cannot be held liable, simply because it was not verified whether the account number and the name refer to the same person. However if the interbank agreement was not incorporated in the contractual relation between the bank and its client, divergent views exist. Some believe the bank should be held liable[38], some believe that the bank is not required to verify conformity between the account number and the name of the beneficiary[39].

D. Impact of the European Directive

26. The Directive on Payment Services in the Internal Market also contains a set of rules relating to liability in case of defective execution. A distinction is made between orders initiated by the payer and orders initiated by the payee. We will only discuss liability concerning orders initiated by the payer (e.g. credit transfers).

1. Basic liability scheme

27. When the account of the payee is not credited with the amount of the transaction the payer's payment service provider will be held liable towards the payer. However, when the payer's payment service provider succeeds in proving that the account of the payee's payment service provider was credited (and therefore that defective execution occurred afterwards), the payment service provider of the payer cannot be held liable by the payer. In such situation, the payee's payment service provider is held liable towards the payee (art. 75). So, the payment service provider of the payer will be liable for everything that goes wrong before the account of the payee's payment service provider is credited (and beyond in the unlikely event that it cannot be established that the account of the payee's payment service provider has been credited). The payee's payment service provider is liable for everything that goes wrong after its account has been credited. Therefore, either the payer or the payee will have a claim against his own financial institution without having to prove that its institution has defaulted.

When the payer's payment service provider has compensated the payer and defective execution was due to another payment service provider, the latter must compensate the payer's payment service provider for the losses incurred or sums paid under article 75 (art. 77).

2. Escaping liability

28. The payment service provider cannot escape liability by proving that it or an intermediary institution did not default. Neither is it possible to invoke contractual clauses, limiting the liability of the payment service provider, as the regime incorporated in the Directive is mandatory.

[38] Chamber of Commerce 2 September 1998, *Revue de droit commercial* 1999, 691.
[39] Mons 2 December 1987, *Droit de la Consommation* 1989/5, 52.

However the payment service provider will be able to escape liability in case of *force majeure* (art. 78). He will also be able to escape liability when the payment service user informs the payment service provider too late about the incorrect execution. More specifically, article 58 of the Directive determines that the payment service user can only obtain rectification if he notifies his payment service provider without undue delay on becoming aware of any incorrectly executed transaction and not later than 13 months after the debit date, unless, where applicable, when the payment service provider has not fulfilled its information requirements. First, it must be stressed that in case notification takes place too late, the payment service user will have accepted the transaction, which implies that rectification is no longer possible, not even when the payment service user can prove that defective execution was due to a mistake of the payment service provider. Second, this rule cannot be interpreted in the sense that the payment service user always disposes of 13 months to notify the payment service provider. On the contrary, notification must take place with undue delay. The starting point is the point in time at which the payment service user becomes aware, *or should have been aware*, of the incorrect execution (words in italics added by the author). Indeed, not being aware of the incorrect execution will in certain circumstances be attributable to the payment service user itself. Moreover, the point in time at which someone actually becomes aware of incorrect execution is difficult to establish.

29. The question arises whether the payment service provider will be able to escape liability by proving something has gone wrong before he received the order, for example during transmission of the order from the payment service user's computer to the payment service provider. Although the Directive does not deal with this question explicitly, we believe it suggests that the payment service provider will indeed be liable in such situation, since it determines "when a payment transaction *is initiated* by the payer the payment service provider shall be liable to the payer for *correct execution* of the payment transaction...". In any event such interpretation is desirable (provided that the means used to initiate the transfer are in conformity with the requirements set in the framework contract). Since the payment service provider chooses which systems can be used to initiate payment transactions it is logical that it assumes responsibility for any failure of it.

3. Incorrect account number

30. Article 74 of the Directive contains a specific rule with regard to the situation where defective execution is due to the fact that the payment service user provided an incorrect unique identifier[40], i.e. for example a wrong account number. The rule is important since it determines whether the payment service provider can be held liable for not verifying whether the account number of the beneficiary and the name of the beneficiary refer to the same person.

If a payment order is executed in accordance with the unique identifier provided by the payment service user, the payment order is deemed to be executed correctly with regard to the payee specified. So, where the IBAN or bank account number was specified as the unique identifier, it takes precedence over the name of the payee, if it is provided additionally. Therefore the payment service provider cannot be held liable because it did not verify whether the account number / IBAN and the name of the payee refer to the same person. However, in

[40] A unique identifier refers to the information specified by the payment service provider which is to be provided by the payment service user in order to identify unambiguously the other payment service user and / or his payment account involved in a payment transaction. For example, it consists of the IBAN (International Bank Account Number), the BIC (Bank Identifier Code), a bank account number, a card number or a name.

this context it is important to mention that, according to the rules on information requirements, the payment service provider must inform in the framework contract (if any) the payment service user about the unique identifier to be used (art. 42.2). We believe it is possible to argue that, in case the payment service provider does not fulfil its information obligation, it will not be able to invoke this rule, which favours him.

Although the payment service provider is not liable for the non-execution or defective execution of the transaction, due to an incorrect unique identifier, the payment service provider must make a *bona fide* effort to recover the funds involved in the payment transaction. This implies that the payment service provider must contact the institution of the person whose account was mistakenly credited as a result of the incorrect unique identifier. If there are sufficient funds available on that person's account his institution will normally be able to correct the error by debiting this persons' account and wiring the amount to the payer's institution. If agreed so in the framework contract, the payment service provider may charge the payment service user for such recovery.

4. Compensation

31. According to the Directive, the payment service provider will be held liable for the full amount of the payment transaction. In addition he is strictly liable for any charges and for any interest charged to the payment service user as a consequence of the non-execution or defective execution of the payment transaction. So, if the payment service provider of the payer has debited the payer's account and the payee's payment service provider's account was never credited, the payment service provider of the payer will have to credit the payer's account - without undue delay - with the amount of the transaction, the costs related to that transaction and any interests charged as a consequence of the defective execution. Whether the payment service provider is liable for consequential damages (e.g. compensation the payment service user must pay to the beneficiary because he has not paid in due time) has to be determined according to the law applicable to the contract concluded between the payment service user and the payment service provider (art. 76). Most countries do not hold the payment service provider liable for consequential damages.

The fact that payment service providers are not liable for consequential damages is a good thing. If payment service providers would be liable for all consequential damages, this would probably lead to an important increase of the costs of payment transactions for all customers. Therefore, one could argue that it is probably best to leave it to the payment service user to determine in his relationship with his payment service provider whether he wants the payment service provider to be liable for consequential damages (as is the case in the United States (Article 4 A-305 (d) Uniform Commercial Code)[41]. That way, only payment service users choosing for such a liability regime should then pay the additional cost.

5. Comparison with the existing Belgian legislation

32. Whereas the existing rules differentiate between different types of credit transfers, the rules laid down in the new Directive basically apply to all credit transfers. It is irrelevant whether the order is initiated electronically or in writing and whether it has a cross-border or domestic nature. This can be considered as one of the main advantages of the new Directive, since today it is necessary in Belgium to distinguish between cross-border credit transfers

[41]See: MRF Resources Ltd. v. Merchants Bank of New York, 674 NE 2d 1366, 31 UCC Rep. 2d 298 (NY 1996).

within the European Union, domestic payments which are initiated electronically by physical persons and all other payment transactions. Whereas the first fall under the scope of the Act f 9 January 2000 and the second under the scope of the Act of 17 July 2002, the latter are governed by general principles of civil law. Not only is it easier and more transparent that there is one single regime, also there are – as far as liability in case of erroneous execution is concerned - no good reasons to differentiate between several types of credit transfers[42].

33. As mentioned, the Act of 9 January 2000 limits liability for wrongful execution to 12.500 €. Such limitation is not incorporated in the new Directive. By eliminating this liability limitation one of the major disadvantages of the system incorporated in the Act of 9 January 2000 is solved[43]. Indeed, there are no good reasons for limiting liability beneath the amount of the transaction. More specifically, the new rules imply that a payer of a transaction of for example 35.000 €, no longer needs to invoke general principles of civil law to recover the damages exceeding 12.500 € (22.500 €). In this context it is worth recalling that the scope of application of the Directive is not limited to payment transactions up to a certain amount.

34. Another difference relates to the situation when defective execution is due to an intermediary institution which is chosen by the payee's payment service provider. According to the Act of 9 January 2000 it is the beneficiary's institution that will be held liable towards the beneficiary; according to the new Directive it is the payer's payment service provider who is liable towards the payer.

35. According to the Act of 17 July 2002 the issuer of an electronic payment instrument is liable for the non-execution or defective execution of a transaction with an electronic payment instrument, when the transaction was initiated at a device or terminal or through equipment, authorized for use by the issuer (art. 8). Similar to the Act of 17 July 2002 - but contrary to the Act of 9 January 2000 - the new Directive in our view does not enable the payment service provider to escape liability by proving that the order was changed during transmission from the payment service user's computer to the issuer. However the new Directive, contrary to the Act of 17 July 2002, enables the payment service provider to escape liability by invoking *force majeure* and therefore, being based on the principle of maximum harmonisation, reduces the protection offered by the Act of 17 July 2002.

In conclusion, it is clear that the new Directive offers the payment service user more protection than the Act of 9 January 2000, in particular by eliminating the limitation of liability to 12.500 €. However it is regrettable that the payment service provider still has the possibility to escape liability for the amount of the transfer by invoking *force majeure.* This rule favouring the payment service provider reduces the level of protection not only compared to the Act of 17 July 2002 but also compared to general principles of civil law (supra nr. 22).

Chapter 2. Fraudulent payment transactions

36. In case of a fraudulent payment transaction a distinction must be made between transactions falling under the scope of application of the Act of 17 July 2002 on electronic payment transactions and other transactions. As already indicated the Act of 17 July 2002 only applies to transactions that were initiated electronically. Moreover fraud must relate to an

[42] R. STEENNOT, "The Single Payment Area", *Journal of International Banking Law and Regulation* 2003, 484-485.

[43] X. FAVRE-BULLE, *Les Paiements transfrontières dans un espace financier européen*, Basel, Helbing & Lichtenhahn, 1998, 292-293.

instrument that was accorded to a physical person. If the Act of 2002 is not applicable (e.g. if the fraudulent order was initiated in writing), liability will have to be allocated according to general principles of civil law as modified by contractual terms incorporated in the contractual relation between the bank and its clients.

§1 Transactions falling under the scope of application of the Act of 17 July 2002

37. In the case of theft or loss of an electronic payment instrument, one must make a distinction between transactions carried out before notification of loss or theft of the electronic payment instrument and transactions carried out after notification[44]. For the latter, the issuer will be liable, except when the holder acted fraudulently (this is for example the case if the holder, who has not lost his card, notifies the issuer of loss and then immediately withdraws money from an ATM)[45]. On the other hand, up to the time of notification, the holder bears the loss up to a maximum of 150 €, except where the holder acted fraudulently or with extreme negligence (art. 8).

A. Obligation of the issuer to prevent further use of the instrument upon notification

38. It is clear that the notification plays a central role. The issuer (or the entity specified by him) therefore must provide appropriate means which enable the holder to notify the loss or theft of his electronic payment instrument at any time of day or night (art. 9). So, the holder must have the possibility to notify loss or theft 7 days a week, 24 hours a day. It is also clear that the holder must have the possibility to notify the issuer by phone, as this is the easiest and fastest way to notify loss or theft.

The Belgian Act contains a very specific sanction if the issuer does not meet this obligation (art. 12). If the holder doesn't have the possibility to notify the issuer at any time, he cannot be held liable at all (except in case the holder acts fraudulently himself). This rule is very – or rather too - severe for the issuer, as the issuer will be held liable for all transactions that have taken place and not only for those transactions that have taken place after that point in time where the holder tried to notify loss or theft but was unable to do so because no appropriate means for notification were available.

39. It is important to emphasize that the issuer will always be liable for those transactions that have taken place after notification, even if he was not actually able to prevent further use of the instrument immediately (e.g. if a credit card is used *immediately* after notification and this without electronic identification of the card (e.g. when the transaction is initiated without using an electronic terminal)[46]). So, the issuer cannot escape liability by proving he has taken all reasonable steps to prevent further use of the instrument[47]. The fact that the issuer cannot prevent the use of the credit card in such situation is irrelevant.

40. The contractual terms of some issuers determine that the holder whose card has been stolen must file a complaint at the police station. However, the non-fulfilment of this

[44] L. EDGAR, "Paying in an online world", *Euredia* 2000, 192-193.
[45] The issuer must prove that the holder has acted fraudulently.
[46] T. LAMBERT, "La loi du 17 juillet 2002 relative aux opérations effectuées au moyen d'instruments de transfert électroniques de fonds", *Revue du droit commercial* 2002, 579.
[47] X. FAVRE-BULLE, *Les Paiements transfrontières dans un espace financier européen*, Basel, Helbing & Lichtenhahn, 1998, 324.

obligation cannot exempt the issuer of liability[48]. As soon as notification has taken place the issuer is liable for all further transactions.

B. The liability of the holder for transactions taken place before notification

1. The concept of extreme negligence

41. As we have already indicated the holder is liable for all transactions that have taken place before notification, if he has acted extremely negligent. Although the Belgian Act of 17 July 2002 does not contain a real definition of the concept of extreme negligence, it gives us a few examples of extreme negligence. More specifically it determines that a holder acts *for instance* extremely negligent when he records his personal code in any easily recognizable form, in particular on the electronic payment instrument or on any item which he keeps or carries with the instrument and also when he does not notify the issuer without undue delay after becoming aware of the loss or theft of the instrument (art. 8 §2).

In this context the question arises when a personal code is recorded in an easily recognizable form. For example, what to do if a card holder encrypts his personal code in a phone number? In Germany the court of Kassel[49] decided that a card holder that incorporates his PIN in a phone number, written down on a paper in his wallet, acts extremely negligent. In the Netherlands[50] it was decided that a card holder that incorporates his PIN in a phone number, written down in his agenda, containing several phone numbers did not act extremely negligent. It is clear that the circumstances will determine the outcome.

42. As indicated the holder also acts extremely negligent if he doesn't notify the issuer of loss or theft, immediately after becoming aware of loss or theft. So the holder must act promptly as soon as he finds out that his instrument is stolen. As it is impossible to prove the actual knowledge of loss or theft of the instrument, it is sufficient that the holder *should have been* aware of loss or theft. In this context the question also arises whether a holder is obliged to verify regularly whether he still is in possession of his payment instruments. According to the Court of Appeal in Brussels there is no such obligation[51]. The Court argued that a person does not act extremely negligent simply because he only finds out that his credit card is stolen after one month[52]. Of course, the circumstances of the case will determine the outcome. For example, when the holder in that period of one month received his statements of account, mentioning the fraudulent transactions, he is or at least should have been aware of loss or theft. If several days or even hours pass before notifying the issuer, he will be responsible without upper limit.

43. It is important to stress that the holder, who notifies the issuer too late, is liable for all transactions that have taken place before notification. For example, a card is stolen on February the 1st, the holder becomes aware of the theft on 10 February and notifies the issuer on 12 February. He will be liable without any limitation, not only for the transactions that have taken place between February10 and 12, but for all transactions initiated before 12 February.

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[48] See also: P. BOUTEILLER, "Les relations juridiques entre banques et porteurs de cartes", *Banque* 2000, nr. 70, 31.
[49] AG Kassel 16 November 1993, *Wertpapiermitteilungen* 1994, 2110.
[50] GCB 24 September 1994, *Tijdschrift voor Consumentenrecht* 1995, 183.
[51] Brussels 4 October 2005, *Revue du Droit Bancaire et Financier* 2006, 148, note R. STEENNOT.
[52] Brussels 27 May 2002, *Revue du droit commercial* 2004, 158, note J.P. BUYLE en M. DELIERNEUX.

44. As the Act only contains two examples, it is clear that there will be other cases of extreme negligence. Whether certain behaviour constitutes extreme negligence, is to be decided by the judge taking into account all relevant circumstances (art. 8 §2). In the recent past the Court of Appeal in Brussels decided that extreme negligence requires more then mere carelessness. So the term extreme negligence refers to behaviour a normal and reasonable person would never undertake. More specifically the Court of Appeal decided that a person does not act extremely negligent if he does not verify immediately whether his credit card is still in his wallet that is given back to him after it has fallen out of his pocket in a restaurant[53].

In another case the Court of Appeal in Brussels argued that a holder, who has to perform some works in a supermarket, does not act extremely negligent if he leaves his wallet and payment instrument in the hand shoe locker of his car, that has been locked[54]. But an old lady leaving her credit card in a hospital room while being medically examined somewhere else in the hospital acts extremely negligent. The judge reaching this decision paid attention to the circumstances of the case and found it particularly important that the old lady put her money in a safety box, but not her credit card[55]. More in general one could argue that someone acts extremely negligent if he leaves his payment instrument in a room which is not kept locked and is accessible to other people.

45. Finally it must be emphasized that many issuers define the concept of extreme negligence in their general terms and conditions, in most cases by enumerating behaviour that must be regarded as extreme negligence. The question arises whether the judge is bound by those terms. The answer to this question is clearly negative, since the rules on liability incorporated in the Act of 17 July 2002 are mandatory. If one would accept that banks can freely determine which behaviour constitutes extreme negligence they would have the possibility to avoid the application of the limitation of liability up to 150 € simply by describing the concept of extreme negligence very broadly. Therefore, even if the contractual terms determine what constitutes extreme negligence it will be up to the judge to determine whether certain behaviour constitutes extreme negligence or not. However, all of this does not mean that contractual terms relating to extreme negligence are completely irrelevant. By describing in the contractual terms which behaviour entails certain risks, the issuer informs the holder about the existing risks. The judge will hold someone who is informed about the risks more easily liable than a person who was not informed, because the former is deemed to have more knowledge of those risks.

2. The burden of proof with regard to the absence or existence of extreme negligence

46. In all of the cases mentioned above fraudulent use related to credit cards and the circumstances in which fraudulent use occurred were clear. In most cases however it is unclear what happened exactly. The question then arises whether it is up to the holder to prove that he did not act extremely negligent or up to the issuer to prove that the holder indeed acted extremely negligent. In some European countries a presumption of extreme negligence is used (e.g. Germany[56]), implying that the mere use of the instrument leads to presume that the holder acted extremely negligent. The use of the presumption of extreme

[53] Brussels 4 October 2005, *Revue du Droit Bancaire et Financier* 2006, 148, note R. STEENNOT.
[54] Brussels 13 September 2005, *Revue du Droit Bancaire et Financier* 2006, 145, note R. STEENNOT.
[55] Juge du Paix Brussels 7 July 2006, *Revue du Droit Bancaire et Financier* 2007, 134.
[56] See: S. WERNER, "Anscheinsbeweis und Sicherheit des ec-PIN-Systems im Lichte der neueren Rechtsprechung", *Zeitschrift für Wirtschafts- und Bankrecht* 1997, 1516-1519.

negligence implies that the holder must deliver proof of a negative fact, i.e. that he did not act extremely negligent.

Article 8 §2 of the Act of 17 July 2002 explicitly prohibits the use of a presumption of extreme negligence. The *mere* fact that a third person was able to use the instrument cannot prove that the holder of the instrument has been negligent[57]. The prohibition to use a presumption of extreme negligence avoids that the limitation of liability to 150 €, which is the main feature of the Belgian liability scheme, becomes purely fictitious[58]. Indeed, when the presumption is admitted, there will be practically no cases in which the liability of the holder is limited to 150 €[59]. However, the fact that it is prohibited to deduct from the sole use of the instrument that the holder acted extremely negligent does not prevent the judge from using other presumptions in order to decide that the holder acted extremely negligent[60].

C. No physical presentation and electronic identification

47. According to article 8 §4 of the Belgian Act of 17 July 2002 the holder cannot be held liable at all if fraudulent use of the instrument occurs without physical presentation and electronic identification (of the instrument itself)[61]. The use of a confidential code or any other similar proof of identity is not, by itself, sufficient to entail the holder's liability. This rule is very important as it applies to many payments made over the Internet. Indeed, many payments over the Internet take place by communicating the credit card details, i.e. sending the card number, the expiry date and verification code mentioned on the back of the card, over the net. In a situation like that the credit card is not physically presented, nor identified electronically (because it is not inserted in an electronic terminal). Therefore, if an unauthorised person (e.g. a waiter who has written down these details when accepting the credit card for payment) uses these details to pay for goods or services on the Internet (or over the phone), the holder cannot be held liable at all.

It is worth mentioning that this does not mean that it will be the issuer or card company who in the end bears the risk of fraudulent use. The agreements concluded between the credit card company and the merchants accepting payment in that way determine that in case the holder disputes a transactions the account of the merchant can be debited (so called charge back). The validity of these charge back clauses has been acknowledged by the Court of Appeal in Brussels[62].

D. Unsolicited payment instruments

48. Article 6, 3° of the Belgian Act of 17 July 2002 determines that the issuer may not dispatch an unsolicited electronic payment instrument, except when it is a replacement for an electronic payment instrument already held by the holder. If an instrument is dispatched without being solicited and the instrument afterwards is used fraudulently by a third person, the holder cannot be held liable for this fraudulent use, not even when the holder acted extremely negligent (art. 12).

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[57] Brussels 4 October 2005, *Revue du Droit Bancaire et Financier* 2006, 148, note R. STEENNOT.
[58] X. THUNIS en E. MEYSMANS, "La réglementation des cartes de crédit", in *La nouvelle loi sur le crédit à la consommation*, Brussel, Créadef, 1992, 141.
[59] After all, the holder will usually not be able to prove the absence of extreme negligence.
[60] Tribunal du Commerce Brussels 27 November 2006, *Revue du Droit Bancaire et Financier* 2007, 137.
[61] Brussels 18 June 2007, *Nieuw Juridisch Weekblad* 2007, 935.
[62] Brussels 18 June 2007, *Nieuw Juridisch Weekblad* 2007, 935.

E. Reloadable instruments

49. Finally, specific rules apply in case of theft or loss of a reloadable instrument. If one loses his instrument, or one's instrument is stolen, the issuer is not liable for the value stored on the instrument, even if the instrument was used after notification (art. 8 §3). The issuer can only be held liable if a third person is able to reload the reloadable instrument after notification of loss or theft.

The fact that the issuer cannot be held liable for the value stored on the instrument seems prima facie logical, if one takes into account that reloadable instruments are used in payment transactions without a connection with the central computer being made (off-line). As there is no connection at the time payment is made, the issuer cannot verify whether the instrument is reported lost or stolen. However, there is one situation in which the solution should be different. If for example the holder has one payment card, serving as reloadable instrument and as debit card, and the holder has reported the loss or the theft of the card and the issuer was able to recover the card (e.g. because the thief tried to use the card after notification at an ATM), the issuer should be obliged to pay to the holder the value that is still stored on the card.

§2 Transactions not falling under the scope of application of the Act of 17 July 2002

50. In case of a fraudulent transaction not falling under the scope of application of the Act of 17 July 2002 general principles of civil law need to be applied[63]. Most cases of fraud relates to credit transfers that were initiated in writing.

Most courts and scholars believe that in case of a fraudulent credit transfer, article 1239 of the Civil Code applies, which determines that payment must be made to the creditor or the person being mandated by the creditor to receive payment on his behalf[64]. If payment is made to another person, the debtor has to pay the creditor again. It is irrelevant whether the debtor has made a mistake or not. Applied to fraudulent credit transfers: if the bank executes a fraudulent order it does not pay to the creditor (account holder) or a person being mandated to receive payment on his behalf (in a normal transaction the beneficiary of the credit transfer). Therefore the bank, whether or not it has made a mistake[65], has to compensate the account holder, i.e. credit the account it has debited??? wrongfully.

However it is widely accepted that the contractual terms can determine that article 1239 of the Civil Code is not applicable in case of a fraudulent payment transaction[66]. Today the contractual terms of most banks contain such an express stipulation. Of course this does not mean that the bank executing a fraudulent order cannot be held liable at all. The fact that article 1239 of the Civil Code is not applicable does not prevent general principles of liability

[63] There exist specific rules in case of fraudulent use of cheques and cheque forms, but we do not deal with cheques in this paper.
[64] Brussels 5 March 2005, *Revue du Droit Bancaire et Financier* 2006, 82; Brussels 18 March 2003, *Revue du droit commercial* 2005, 152, note J.P. BUYLE en M. DELIERNEUX; Antwerpen 12 January 2006, *Revue du Droit Bancaire et Financier* 2006, 87; Brussels 19 November 2002, *Rechtskundig Weekblad* 2005-2006, 1626, note S. RUTTEN. See also: G.L. BALLON, "Le paiement par une banque d'une somme d'argent sur base d'un faux ordre", *Revue de la Consommation* 1992-1993, 78; A. BRUYNEEL, "Le virement", in *La banque dans la vie quotidienne*, Brussel, Editions du jeune barreau, 1986, 420.
[65] Brussels 5 March 2005, *Revue du Droit Bancaire et Financier* 2006, 82.
[66] Antwerpen 12 January 2006, *Revue du Droit Bancaire et Financier* 2006, 87.

from applying, which means that the bank executing a fraudulent order can be held liable when it made a mistake. But once again one must take into account the general terms and conditions, which most often contain exclusion clauses, limiting the banks liability. With regard to the validity of these terms a distinction must be made between contracts concluded with consumers and contracts concluded with professionals. If the account holder is a consumer the bank cannot exempt its liability for gross mistakes (art. 32, 11° of the Act on Trade Practices). If the account holder is not a consumer, liability can be excluded in case of gross negligence, but not in case of intent[67]. Moreover the bank can never exempt itself from the obligation to verify the signature[68]. In practice, the contractual terms of most banks do not make a distinction between consumers and professionals, which implies that most banks can be held liable as soon as they make a gross mistake or act grossly negligent. This will for instance be the case 1) if the signature on the order clearly doesn't match the client's signature[69] 2) if the bank did not follow the internal security procedure (e.g. for orders initiated from abroad)[70] and 3) if the bank, that holds the account of the victim and the account of the person acting fraudulently, did not verify whether the account number and the name of the beneficiary refer to the same person[71].

Apart from all of this, it must be mentioned that the bank will also be able to escape liability if it can prove that the holder made a mistake[72] or, according to some, it could legitimately trust that the order was give by its client[73].

§3 Impact of the European Directive on Payments in the Internal Market

51. The basic liability scheme that is elaborated in the Directive resembles the rules that are incorporated in the Act of 17 July 2002, implying that a distinction is made between transactions before and after notification. The issuer will be held liable for all transactions that occur before notification. The holder will be held liable for transactions that have taken place before notification up to 150 €, except when he fails with intent or gross negligence to fulfil one or more of his obligations under article 56 of the Directive (e.g. the obligation to take all reasonable steps to keep the instrument safe, the obligation to notify loss or theft without undue delay). Nevertheless there are a few differences.

52. As indicated before the Directive applies to payment transactions initiated electronically as well as payment transactions initiated in writing. Therefore, the basic liability scheme will have to be applied to fraudulent credit transfers initiated in writing. It is clear that this implies that liability will have to be allocated in a completely different way. The question no longer will be whether the bank has acted (grossly) negligently, but whether the account holder acted grossly negligently. If not, his liability will be limited to 150 €.

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[67] Cour de Cassation 25 September 1959, *Arresten Cassatie* 1960, 86.
[68] Cour de Cassation 27 September 1990, *Revue bancaire et financière*1992, 37, note J.F. ROMAIN; Antwerpen 12 January 2006, *Revue du Droit Bancaire et Financier* 2006, 87.
[69] Tribunal du Commerce Brussels 30 September 2004, *Revue du droit commercial* 2006, 81, note J.P. BUYLE en M. DELIERNEUX (in this case the bank was not held liable because the signature looked like the account holder's signature).
[70] Brussels 20 December 2005, *Revue du droit commercial* 2007, 58, note J.P. BUYLE en M. DELIERNEUX.
[71] Antwerpen 12 January 2006, *Revue du Droit Bancaire et Financier* 2006, 87.
[72] Mons 29 March1999, *Revue du droit civil* 2001, 76, note R. STEENNOT.
[73] Brussels 19 November 2002, *Rechtskundig Weekblad* 2005-2006, 1626, note S. RUTTEN; G.L. BALLON, "Le paiement par une banque d'une somme d'argent sur base d'un faux ordre", *Revue de la Consommation* 1992-1993, 79-80; A. BRUYNEEL, "Le virement", in X (ed.), *La banque dans la vie quotidienne*, Brussel, Editions du jeune barreau, 1986, 421.

53. Second, article 59 of the Directive contains some interesting rules on the burden of proof. When a payment service user denies having authorised an executed payment transaction, the payment service provider (= issuer) must prove that the payment transaction was authenticated, accurately recorded, entered into accounts and not affected by technical breakdown or another deficiency (art. 59.1). Therefore, it is up to the payment service provider to prove that the transaction was authenticated, for example to prove that the instrument and the PIN have been used.

This rule however does not determine who has to prove the absence or existence of gross negligence. In this context article 59.2 is relevant. It determines that the use of a payment instrument, recorded by the payment service provider in itself is *not necessarily sufficient* to prove either that the transaction was authorised by the payer (= holder) or that the payer acted fraudulently or failed with intent or gross negligence to fulfil one or more of his obligations under article 56. The question arises whether this rule prohibits the use of a presumption of gross negligence. *Not necessarily*, what does this mean? This rule, clearly being a political compromise, seems not to prohibit the use of a presumption of extreme negligence in an absolute way. If it would have been the intention of the European legislator to completely prohibit the use of a presumption of gross negligence, he would have determined that the use of the instrument in itself is *not sufficient* to prove that the payer acted grossly negligent. Therefore it seems that it is up to the judge to decide whether or not to use the presumption of gross negligence. The Directive being based on the principle of maximum harmonisation prohibits the Member States to incorporate higher levels of protection than the one incorporated in the Directive. Some argue that the Directive prohibits the Belgian legislator to determine that the presumption of extreme negligence can never be used.

54. Finally it is worth mentioning that the Directive does not contain an explicit rule which determines that the holder cannot be held liable in case the instrument is used fraudulently without physical presentation and electronic identification of the instrument. Does this mean that the basic liability regime for example also will have to apply to payments effectuated on the basis of the number and expiry date of the credit card? Answering this question, one has to take into account that the payment service user can only be held liable if the payment service provider can prove that the transaction has been authenticated (art. 59). According to article 4,19 authentication means a procedure which allows the payment service provider to verify the use of a specific payment instrument, *including its personalized security features*. One can argue that the credit card number and its expiry date do not constitute personalized security features. If you accept such reasoning, the card holder cannot be held liable if someone else has used his credit card details to pay for goods and services at a distance, since the payment service provider will not be able to prove that the transaction was authenticated.

§ 4 Evaluation

55. If we compare the rules concerning unauthorised payment transactions, laid down in the Belgian Act of 17 July 2002 and in the European Directive on payment services in the internal market to the United States Truth in Lending Act and Electronic Funds Transfer Act, we see that both only have similar rules regarding transactions that have taken place after notification of loss or theft of the instrument. Concerning the liability for transactions that have taken place before notification of loss or theft, the approach is totally different. According to the Truth in Lending Act liability for transactions that have taken place before notification is always limited to 50 USD. According to the Electronic Funds Transfer Act and Regulation E,

a distinction must be made in function of the point in time on which notification takes place. If the loss or theft of the access device is reported *within two business days after learning of the loss or theft of the access device*, the consumer will be liable for unauthorised transfers only up to a value of 50 USD or the amount of the unauthorised transfer that occurred before notice to the financial institution (whichever is less). If a consumer fails to notify the institution within two business days after learning of the loss or theft of the access device, the consumer's liability cannot exceed 500 USD. However, if the consumer fails to report loss or theft within sixty days of the transmittal of the periodic statement, on which the unauthorised transfers are recorded, he will be liable for all transactions that have taken place after this period of sixty days and before notification. Contrary to what is the case in Belgium and the European Directive, extreme negligence does not play a single role. The only thing that matters is the timeframe within which notification takes place.

The problem with the European approach is that the concept of gross negligence plays a too important role[74]. Allocating liability for fraudulent transactions that have taken place before notification exclusively in function of gross negligence implies that the burden of proof will in reality, at least in many cases, determine the extent of liability. The rule relating to the burden of proof, which is incorporated in article 59.2 of the Directive is ambiguous. This is probably due to the fact that the prohibition to use a presumption of gross negligence, as well as the permission to use such presumption lead to unjustified results. If the European legislator would have clearly imposed the burden of proof on the payment service user (by using a presumption of gross negligence), the limitation of liability up to 150 €, being the main feature of the liability scheme, would have been purely fictitious, since a payer will practically never succeed in proving that he did not act with gross negligence. If the European legislator would have clearly prohibited the use of a presumption of gross negligence, there would be too many cases where the payment service provider is liable for all transactions exceeding 150 €,, simply because he hasn't been able to prove the existence of gross negligence.

In the past it has been argued that, as far as liability is allocated in function of gross negligence, it can be interesting to make a distinction between the instruments used[75]. Instruments such as debit cards and credit cards are far more sensitive to loss and theft than for example e-banking systems that make it possible to initiate credit transfers on the Internet. Moreover, fraud with e-banking systems is often committed by persons from the payment service user's direct environment. Taking into account these facts, it is probably justified to apply a presumption of gross negligence in case fraud with such instrument is committed. Also a distinction between loss and theft of the instrument has been suggested[76]. In case of loss it is hard to imagine a situation in which fraudulent use is possible without the payment service user acting grossly negligent. Therefore it is justified to impose the burden of proof on the payment service user. In case of theft on the contrary, there is a chance that the holder did not act grossly negligently - for example it is possible that the thief has spied on the payment service user before stealing the instrument (which seems to happen quite often in Belgium in self-banking spaces) - so that it is justified to impose the burden of proof on the payment service provider. However, in many situations it is impossible to determine whether the instrument has been lost or stolen. Therefore the problem remains.

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[74] See also: B. GEVA, *Bank Collections and payment transactions. A comparative legal analysis*, Oxford, Oxford University Press, 2001, 420.
[75] J. BERKVENS, "Elektronisch betalingsverkeer", *Computerrecht* 1997, 264.
[76] X. FAVRE-BULLE, *Les Paiements transfrontières dans un espace financier européen*, Basel, Helbing & Lichtenhahn, 1998, 340.

56. As an alternative I find a combination of the European and US approach attractive, especially with regard to fraudulent use of debit and credit cards accorded to consumers. More specifically, I believe that the liability of the payment service user for transactions that have taken place before notification should always be unlimited as soon as the payment service provider actually can prove that the payment service user has been grossly negligent (for example because the PIN was recorded on the card that has been withdrawn after notification by an ATM). If it is not possible to actually prove the existence of gross negligence, the liability of the payment service user should be determined in function of the timeframe within which the payment service user notifies the payment service provider of loss or theft, which implies that a late notification as such cannot constitute extreme negligence.

Such regime has several benefits. First, it becomes impossible that the payment service user will be held liable for all transactions taking place before notification, simply because he cannot prove that he did not act extremely negligent. Thus the regime guarantees that the liability of the payment service user who did not act extremely negligent and who notifies the payment service provider in time is limited. Second, the possibility for the payment service provider to escape liability by proving extreme negligence benefits the system. Payment service users will know that there is a chance that they will be held liable without limitation when they act grossly negligent. So they will be stimulated to take reasonable steps to keep their instrument safe. Finally, determining the amount of liability in function of the time that goes by after becoming aware of theft or loss ensures on the one hand that the payment service user always has a good reason to notify loss or theft, on the other hand that the payment service user will not be liable for all transactions taking place before notification when he did not notify the payment service provider immediately after becoming aware of loss or theft.

Chapter 3. Time of payment

57. When talking about the law of payments a typical question is: when does payment take place in the relation between the originator and the beneficiary? Contrary to what is the case in the Netherlands, where the Civil Code itself determines that payment takes place when the account of the beneficiary is credited (art. 6: 114, 2), the Belgian legislation does not contain a provision determining the date of payment.

In Belgian legal doctrine several theories were elaborated. The majority of the authors argue that payment takes place when the account of the beneficiary itself is actually credited with the amount ordered[77]. Some authors however believe that payment already takes place when the account of the originator is debited (when the originator and the beneficiary hold their account at the same financial institution) or when the account of the beneficiary's financial institution is credited (when the originator and beneficiary hold their account at a different

[77]A. BRUYNEEL, "Le virement", in X (ed.), *La banque dans la vie quotidienne*, Brussel, Editions du jeune barreau, 1986, 387-388; H. BRAECKMANS, "Bankrekeningen, betaal- en kredietverrichtingen", *Handels- en Economisch Recht. Deel I Ondernemingsrecht*, Antwerpen, Standaard, 1989, 562; L. CORNELIS, *Algemene theorie van de verbintenis*, Antwerpen-Groningen, Intersentia Rechtswetenschappen, 2000, 506; E. DE LHONEUX, "Les chambres de compensation automatisées", in *Electronic Banking*, Brussel, Story-Scientia, 1989, 78; X. THUNIS, *Responsabilité du banquier et automatisation des paiements*, Namen, Presses Universitaires de Namur, 1996, 278-279. See also: Gent 4 February 2000, *Revue bancaire et financière* 2000, 475, note R. STEENNOT en M. TISON; Antwerpen 17 May 1984, *Rechtskundig Weekblad* 1984-1985, 264; Mons 14 May 1987, *Revue du droit commercial* 1989, 58; Liège 22 December 1982, *Journal des Tribunaux* 1983, 347.

financial institution)[78]. Finally, some authors believe that the mere credit of the account of the beneficiary is not sufficient, payment taking place at that point in time where the beneficiary has the possibility to find out that his account has been credited[79].

Although the highest Court in Belgium, the Cour de Cassation, decided in 2001 that payment takes place when the account of the beneficiary itself is credited, there is still some discussion with regard to the date of payment[80]. This is due to the fact that it was the Chamber of the Court, competent for criminal affairs, that made the judgement. According to some authors this "does not count"[81]. We however believe that there are no good reasons to assume that the Court would decide otherwise in a civil procedure, nothing being specific to a criminal procedure as to necessitate another solution in a civil case.

58. The exact point in time at which payment takes place is important, first of all because it determines when the originator has paid his debts, i.e. has executed his obligation to pay. Therefore the date of payment may in some cases determine whether a person has paid in due time. Suppose payment has to take place at 15 November and the originator's account is debited at 15 November. If the account of the beneficiary is only credited on 16 November payment will have occurred too late if one accepts, like the highest Court, that payment takes place when the account of the beneficiary has been credited.

Second, most authors believe that the date of payment is also crucial in case of bankruptcy of the debtor or creditor in order to determine whether the amount "transferred" belongs to the debtor or the creditor. For example, suppose that the debtor goes bankrupt after the account of the debtor has been debited but before the account of the creditor was credited. If one accepts that payment takes place when the account of the beneficiary is credited and accepts that the date of payment determines to whom the money belongs in case of bankruptcy, the amount ordered will still be a part of the debtor's assets (which implies that any credit to the account of the beneficiary cannot be invoked against the liquidator and that the account of the bankrupt debtor has to be re-credited)[82]. However it must be noted that some authors do not accept that the date of payment is relevant in determining whether the amount transferred is a part of the debtor's or creditor's assets. They either believe that the money has left the debtor's assets once the account of the debtor has been debited[83] or that the money has left the debtor's assets when the account of the beneficiary's institution has been credited[84].

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[78] J. VAN RYN en J. HEENEN, *Principes de droit commercial*, T. IV, 1988, 328-330; M. DASSESSE, "Le moment d'exécution du virement entre deux banques. Vers une remise en cause de la conception traditionelle", *Revue du Notariat* 1987, 426. See also: Brussels 29 January 1965, *Pasicrisie* 1966, II, 36

[79] E. WYMEERSCH, "Aspects juridiques de certains nouveaux moyens de paiement", *Revue bancaire et financière* 1995, 26.

[80] Cass. 30 januari 2001, *Revue du droit bancaire et financier* 2001, 185, note R. STEENNOT.

[81] C.G. WINANDY, "Contribution à l'étude sur la nature du virement", *Revue du droit bancaire et financier* 2002, 187.

[82] P. COPPENS en C. 'T KINT, "Les faillites et les concordats. Examen de Jurisprudence (1979-1983)", *R.C.J.B.* 1984, 508-509; L. CORNELIS, *Algemene theorie van de verbintenis*, Antwerpen-Groningen, Intersentia Rechtswetenschappen, 2000, 506; E. WYMEERSCH, "Aspects juridiques de certains nouveaux moyens de paiement", *Revue bancaire et financière* 1995, 25

[83] A. BRUYNEEL, "Le virement", in X (ed.), *La banque dans la vie quotidienne*, Brussel, Editions du jeune barreau, 1986, 397-402; I. VEROUGSTRAETE, *Manuel de la faillite et du concordat*, Diegem, Kluwer, 1998, 289.

[84] Y. MERCHIERS; P. COLLE en M. DAMBRE, "Algemeen Handelsrecht, Handelscontracten, Bank-, Krediet-, Wissel- en Chequeverrichtingen. Overzicht van rechtspraak (1987-1991)", *Tijdschrift voor Privaatrecht* 1992, 928.

Chapter 4. Revocation of payment transactions

60. Finally the question arises whether the originator who has initiated a payment transaction has the possibility to revoke the order given.

§ 1 Situation in Belgium

61. From a legal point of view a distinction must be made between orders initiated electronically by physical persons and other transactions. The first category of transactions falls under the scope of application of the Act of 17 July 2002, which determines that orders, once initiated, are irrevocable (art. 8 §1). According to the Act there is only one exception to this rule, which relates to the situation where the amount of the transaction is not determined at the time the order is initiated (e.g. where a credit card is used as a guarantee). Although not explicitly determined, one can assume that the principle of irrevocability also does not apply in case the order mentions a future date on which the transaction has to be executed and revocation reaches the originator's institution before that date, in a way and in a time which enables the institution to act upon it.

With regard to transactions not falling under the scope of application of the Act of 17 July 2002, general principles of civil law have to be applied. As far as credit transfers are concerned, most authors argue that this implies that revocation can take place as long as the account of the beneficiary has not been credited[85]. Indeed, the bank of the beneficiary, acting as a substituted agent of the originator must follow the originator's instructions. However, in reality revocation will not be possible since the general terms and conditions of all banks determine that the order, once initiated, cannot be revoked by the originator. Such clauses are valid.

§ 2 The new Directive on Payment Services in the Internal Market

62. Article 66 of the Directive determines that in principle the payment service user may not revoke a payment order once it has been received by the payer's payment service provider. Where the payment transaction is initiated by or through the payee, the payer may not revoke the payment order after transmitting the payment order or giving his consent to execute the payment transaction to the payee. So basically, payment transactions falling under the scope of application of the Directive are irrevocable.

However there are a few exceptions to this rule. In the case of a direct debit and without prejudice to refund rights the payer may revoke the payment order at the latest by the end of the business day preceding the day agreed for debiting the funds. In case the payment service user initiating a payment order and his payment service provider agree that execution of the payment order shall start on a specific day or at the end of a certain period the payment service user may revoke a payment order at the latest by the end of the business day preceding the agreed day.

After these time limits, the payment order can only be revoked if agreed between the payment service user and his payment service provider. In case the payment transaction is initiated by or through the payee and in the case of a direct debit, the payee's agreement shall also be

[85] A. BRUYNEEL, "Le virement", in X (ed.), *La banque dans la vie quotidienne*, Brussel, Editions du jeune barreau, 1986, 386; E. WYMEERSCH, "Aspects juridiques de certains nouveaux moyens de paiement", *Revue bancaire et financière* 1995, 25.

required. If agreed in the framework contract, the payment service provider may charge for revocation.

63. Contrary to the Belgian Act of 17 July 2002, the Directive does not determine that revocation is possible with regard to payment transactions where the amount of the transaction is not determined at the time the order is initiated. The Directive contains another rule to protect the payer in a similar situation. More specifically article 62 determines that a payer is entitled to a refund from his payment service provider of an authorised payment transaction initiated by or through a payee which has already been executed, when the authorisation did not specify the exact amount of the payment transaction when the authorisation was made *and* the amount of the payment transaction exceeded the amount the payer could reasonably have expected, taking into account his previous spending pattern, the conditions in his framework contract and relevant circumstances of the case. The refund consists of the full amount of the executed payment transaction.

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