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EPIF ISSUES PAPER ON PAYMENTS

ABOUT EPIF (EUROPEAN PAYMENT INSTITUTIONS FEDERATION)

EPIF, founded in 2011, represents the interests of the non-bank payment institutions (“PI”) sector at the European level. We currently represent over 250 PIs offering services in every part of Europe. Our diverse membership includes the broad range of business models covered by the PSD including:

- 3-party Card Network Schemes
- Acquirers
- Money Transfer Operators
- FX Payment Providers
- Mobile Payments
- Payment Processing Service Providers
- Card Issuers

EPIF seeks to represent the voice of the PI industry with EU institutions, policymakers and stakeholders. We aim to play a constructive role in shaping and developing market conditions for payments in a modern and constantly evolving environment. It is our desire to promote a single EU payments market via the removal of excessive regulatory obstacles.

We wish to be seen as an infrastructure provider for efficient payments in that single market and it is our aim to increase payment product diversification and innovation tailored to the needs of society (e.g. via mobile and internet).

EPIF is glad to share its high-level views on the review of the PSD and the follow-up to the Green Paper on payment innovation. EPIF is addressing below several issues of concern resulting from both instruments.

1. PSD PASSPORTING REGIME

The PSD has helped to foster the development of a Single Market for non-bank payment services. The success can be measured by the fact that more than 550 payment institutions (PIs) have been authorised to provide their services across borders EU wide. The PSD is one of the real success stories of the Single Market.

EPIF believes that the passporting regime is one of the main successes of the PSD but equally one of the main areas where there is room for improvement in the current PSD review with two main areas of concern:

Enhancing cooperation between host and home authorities

- There is an apparent lack of communication and cooperation between home and host authorities. As a consequence, the cross-border PSD passporting process and the day-to-day supervisory practice should be improved. Also, the role of the host regulator in relation to code of conduct rules and/or PI reporting should be more precisely defined to avoid that a PI has to interact with numerous regulators throughout the EU thereby impeding harmonisation under the PSD.
 - Some host authorities are requesting prudential information directly from a foreign payment institution (PI) instead of communicating with the home supervisor. In general, information exchanges between supervisory bodies seem weak.
 - Some host authorities are imposing reporting obligations on PIs instead of referring requests to the home supervisor.
 - Some host authorities never formally acknowledge the PSD passporting notifications from the home supervisors.
 - Few supervisors still challenge the PSD liberalisation effects via their day-to-day supervisory practices, in particular from an AML/CFT angle.
- EPIF proposes that the role of the host regulator in relation to code of conduct rules and/or PI reporting should be more precisely defined to avoid that a PI has to interact with numerous regulators throughout the EU thereby impeding the harmonisation effects under the PSD.
- EPIF also proposes that a new article is inserted in the PSD 2 where the European Banking Authority (EBA) is given clear authority to set up a framework gathering all national regulators in charge of PI supervision to discuss issues and common solutions at a practical level with stakeholder input.

Scope of Passporting

- Under the current interpretation by the European Commission, ancillary services, even those inherently linked to the service provided (e.g. a foreign exchange conversion by a money remitter) are not part of the passportable payment services.
- Since this technical interpretation and split between payment services and ancillary services was not intended during the PSD negotiations, it should be clarified that certain ancillary services are subject to the passporting rights of authorised PIs.

2. USE OF AGENTS

- The PSD recognises the market reality that many payment institutions offer their services to customers via an agent network. Often customers prefer going through agents because of convenience, geographic proximity or other reasons. The rules should continue to accommodate these consumer choices and competition, while ensuring the safety of payment services.
- Recent discussions amongst Member States and regulators show an increasingly negative attitude towards PSD agents in certain classes of trade (e.g. retailers) and in some Member States. One illustrative example is the recently published European Supervisory Authorities (ESA) protocol¹.
- In many Member States, all classes of trades, including retail chains, have for many years (before and after the PSD came into force) been reliable partners of regulated financial institutions in the provision of financial services. Therefore it is not proportional to categorise entire classes of trade as unsuitable to serve as a PSD agent from an AML/CFT perspective without an analysis and justification on a case-by-case basis.
- Supervisory authorities should as a first step provide additional supervisory guidance for the payments industry in order to enable it to work with agents (all classes of trade) in compliance with the applicable EU regulatory framework. This supervisory guidance could include elements regarding the necessary AML control environment or training requirements.
- The PSD 2 should specify the fit & proper assessment of the PSD agents' management in more detail, ideally harmonising the information which needs to be collected and provided to the Home State supervisor. Currently, the information required and the scope of people screened varies greatly between Member States, creating an unlevel playing field. Such a harmonised "fit & proper

¹ Supervisory Cooperation Protocol between "Home Supervisor" and "Host Supervisor(s) of Agents and Branches of Payment Institutions in Host Member State, July 2012

form” could be part of a new Annex of the PSD 2. Also, it should be clarified that the fit & proper assessment does not apply to the management of properly authorised and supervised EU financial institutions which are already subject to such rules. This is an unnecessary duplication of rules.

- Moreover, as the PSD does not foresee ‘sub-agents’, every agent needs to be notified to the competent authority and entered into the respective register. The PSD 2 should clarify exactly which data needs to be provided to register agents. Supervisory authorities should provide online databases which a PI can access to upload this data.
- The impact of an agent on a PI’s requirement to change its passport from ‘cross-border service’ to ‘establishment’ should be further clarified in the PSD or guidance provided by host regulators to avoid inconsistency.

3. THE EFFECT OF THE AML DIRECTIVE ON THE PSD

- The ability of Member States to impose additional national administrative requirements on payment institutions with respect to AML has acted as a barrier to the effective implementation of the European passport under the PSD.
- The PSD is a maximum harmonisation directive, which aims at establishing a single market for payments in the EU, eliminating barriers of entry and enabling firms to act on a cross-border basis.
- The rules on the prevention of money laundering and terrorism financing form an important part of the regulatory framework and the operating costs of PIs. Unfortunately, the 3rd AML (and 4th) Directive, remains a minimum harmonisation Directive, which in practice means 27 different AML regimes.
- The need for PIs to adapt to local AML legislation means that the maximum harmonisation sought by the PSD is far from being achieved as payment products and services cannot be offered cross-border in a cost efficient manner.
- As both the AML directive and the PSD are under review during the same period, it is necessary that European legislators work on bringing more convergence between the two directives (see also specific EPIF position paper on the 4th AML Directive).
- In relation to card acquiring, the AML requirements imposed on acquirers in respect of sub-merchants of aggregators or marketplaces should be clarified taking into account market reality.

4. ACCESS TO BANK ACCOUNTS IN HOME AND HOST MEMBER STATES FOR PAYMENT INSTITUTIONS

- A key aspect of effectively implementing a single market for payments is ensuring PIs have unfettered access to bank accounts in individual Member States. Many banks are imposing restrictions on payment institutions to open bank accounts.
- Access to bank accounts has proven challenging to some PIs and their agents. This access is indeed vital for PIs' provision of services particularly in relation to settlement and transaction authorisation. We emphasise that access to bank accounts is important for PI's both in their home Member State and in the host Member State.
- In the home state sphere, we emphasise that in the UK for instance, many PIs are held back by the lack of easy access to banking facilities. Many UK banks have effectively adopted a policy not to open accounts for PIs. This means that PI accounts are disproportionately concentrated in one UK bank – this cannot be in the interest of PIs or the consumers they seek to serve, since all issues around pricing are effectively being controlled by the bank providing the account.
- Equally, we believe that there should be easy access to bank accounts for PIs which are seeking to passport their services into other (host) Member States. Access to host state bank accounts should be equally available regardless of the business model of the passporting PI (that is, regardless of whether they are seeking to open a branch, set up an agent or do business by means of the services passport).
- In order to achieve a level playing field, European legislators should ensure via an article or a recital in the revised PSD that banks in Home and Host Member States and EU banking regulations should not limit access to bank accounts and other banking services for PIs.

5. DEFINITION OF REMITTANCES

- One of the business models regulated by the PSD is remittance services; the direct transfer of funds without the use of a bank account.
- EPIF believes that the definition of a money remittance should remain technology neutral as is currently the case under the PSD and that it should not be limited to cash-to-cash operations.
- Many remittance products exist today using non-cash payment methods (e.g. online remittance services paid via debit/credit card or directly via a bank account).

- Otherwise, if it would be limited to cash transactions only, it would discourage innovation in this market and would also push authorized PI providing remittance services outside the scope of their authorized services should they use or accept non-cash means of payment.

6. SEPA GOVERNANCE

- EPIF understands that SEPA governance is currently being reviewed by the European institutions. EPIF fully supports these reforms and believes all relevant stakeholders, including merchants and end users, but also payment institutions as new market players should be involved in the future standard setting process for payments in Europe.
- One of the main challenges for improving SEPA governance is to ensure the fair representation of all affected stakeholders.
- EPIF supports the equal representation of Payment Institutions in all bodies emerging from the SEPA governance reform (SEPA Council, Stakeholder Group and its Working Groups).
- EPIF believes the SEPA standards setting process should be chaired and overseen by the European institutions and should ideally be publicly funded to reflect the public policy interest in SEPA implementation.
- During the transition to the new SEPA governance framework, EPIF should continue to be directly represented in the EPC Plenary and EPC Working Groups. EPIF should also be directly privy to any discussions on SEPA governance reform.

7. SAFEGUARDING OF MERCHANTS FUNDS

- EPIF members who are involved in merchant acquiring represent a range of business models. Not all of these involve holding merchant funds. For those that do we fully agree with the intentions of the regulation but are calling for greater legal certainty, and a better consideration of the different existing business models when it come to the application of the safeguarding rules.
- As a general point, PSD safeguarding provisions are not fit for merchant acquiring in card transactions and would need to be redrafted to take account of the operating reality of the different card acquiring models.
- More specifically, the definition of the “relevant funds” is ambiguous when applied to card acquiring and should be clarified (e.g. the acquirers receive the funds directly from the card schemes in

settlement of amounts owed to them, and not from a payment service user or a payment service provider).

- In particular, it is not entirely clear whether it is intended by the PSD that the funds received by an acquirer from the schemes are held by that acquirer (1) on behalf of the merchant where the acquirer would act only as an intermediary or (2) on their own behalf. Different interpretations may apply depending on the Member State and the acquiring model in question. Please note that (1) would not be consistent with relationships the acquirers have with card schemes and merchants in practice.
- There is a general difficulty that the lack of clarity in the rules may not actually give relevant funds the intended protection or otherwise operate unnecessarily to restrict the freedom of acquirers to manage risk. If it is the EU regulator's intention that safeguarding should apply to card acquirers then the conditions for this should be made clear, and timing and reconciliation requirements relating to safeguarding should take account of the operational reality of the card acquiring process.
- Furthermore, some safeguarding mechanisms allowed by the PSD are not always feasible or even available to PIs, such as insurance cover.

8. AGGREGATORS AND MARKETPLACES

- Aggregators and market places (such as Amazon) are common business models in the market. They sell on behalf of smaller merchants and handle the payments. The problem occurs when regulators request information from the acquirer on those underlying transactions in this business model because the main acquirer (of the market place) has no access to this information.
- As the business models and operations of these businesses are new and evolving, they are not yet given a precise definition at this point by regulators, payment schemes or industry standards.
- A key feature of marketplaces is that the acquired merchant will have many sub-merchants that the acquirer will have no contractual or settlement relationship with – e.g. a merchant selling goods on Amazon will be paid by Amazon, not Amazon's acquirer.
- It is not sufficiently clear how the PSD applies (or not) to various e-commerce developments including aggregators and marketplaces, and their interaction with the acquirers; this should be further clarified. This is important for harmonization of payments, consumer protection and the smooth functioning of this important, developing, industry.
- EPIF believes that where a merchant is relying on the obligation of party such as a marketplace provider or other service provider to forward or pay funds to the merchant in payment of goods or

services sold by a merchant to a third party customer, that party should be subject to the licensing requirements of the PSD as well as the conduct of business requirements insofar as these are relevant to the nature of the payment transaction.

9. SURCHARGING

- We understand that the European Commission is considering harmonising the rules on surcharging.
- European policymakers have already adopted new legislation (Consumer Rights Directive) to limit surcharging to the cost of accepting payment cards.
- But it is widely acknowledged that this will not be practicable to implement, as it is impossible to calculate an accurate cost-based surcharge, since there are many different business models and pricing structures that support payment products and services.
- Any assessment would have to include not only the benefits of particular payment card products and networks, but also the broader social impact not taken into account by merchants when they introduce surcharges.
- Regulators should therefore refrain from ‘price regulating’ surcharging. As an alternative, regulators should completely ban surcharging across the EU as the practice is detrimental to consumer choice and protection and to the efficient functioning of the payments sector.

10. MULTILATERAL INTERCHANGE FEES (MIF) REGULATION

- EPIF understands the European Commission is considering the adoption of a Multilateral Interchange Fees (MIF) Regulation, as part of its follow-up to the Green Paper for card, Internet and mobile payments consultation. Fundamentally, EPIF members oppose any price regulation in the payments sector.

Rather than implement price controls, regulators should instead focus on initiatives to increase competition and transparency so that merchants are well informed about the terms and conditions of card acceptance, before entering into relationships with merchant acquirers or payment networks. Ultimately, any price regulation would dampen competition and investment in commercial and technical innovations, and significantly weaken customer choice.

- Three-party schemes, including those that work with select partners on a bilateral basis, should not be included in the scope of any MIF regulation, as they do not have multilateral interchange fees nor

do they have the characteristics of dominance or collective practices that are a feature of four-party schemes, which have been the subject of multiple competition law investigations in the EU.

- None of these investigations – ongoing or historical, at either national or European level – includes three-party schemes.
- Any action seeking to address issues arising from these cases should not therefore include three-party schemes in scope and, if implemented, would significantly undermine inter-brand competition.

11. LIABILITY FOR UNAUTHORIZED TRANSACTIONS

- The PSD is vague and open to various interpretations regarding the liability of unauthorized transactions.
- The system is potentially open for abuse. The immediate refund policy can create significant abuse from cardholders, who can deliberately and intentionally issue claims close to the 13-month threshold, leaving payment service providers (PSP) defenseless, as they will lack the necessary means to properly investigate.
- The complaint timeframes should be shorter, thus promoting not just efficiency but also fairness for all parties involved (consumers and PSPs) and better fraud and risk prevention policies.

12. PAYMENT TO MERCHANTS

- The PSD should provide greater clarity on the relationship between a payment institution and merchants. Specifically, it should recognize that companies should, within the general scope of the PSD, be able to determine the commercial and financial parameters of their relationship by contract.
- EPIF supports the clarification of the current wording of the PSD's requirements, as to undoubtedly mirror that they apply to payment transactions and services where swift movement of funds is critical to completing the payment transaction on time and where both the payer and the payee are located in a Member State, regardless of the currency in which the transaction is made.
- The wording of the revised PSD should clearly recognize that the payment timeframe in which the payee's PSP funds the payee may be agreed between the parties involved, especially when the payee is not a consumer. This is the case for merchant acquiring in card transactions, where the movement of funds between issuer and acquirer is irrelevant to the acquirer's obligation to pay the

merchant. Therefore, EPIF advocates that any applicable rules should not be prescriptive so that the payee and its PSP can decide based on business needs, risk management and convenience.

13. ACCESS TO DOMESTIC SETTLEMENT SERVICES FOR PAYMENT INSTITUTIONS

- While the PSD enshrines the right of payment institutions to have access to some payment clearing and settlement systems, this right has often been superseded by unfounded concerns about the impact of access on the integrity of the clearing and settlement systems. These measures do not take into account the strict prudential and conduct of business rules imposed on payment institutions under the PSD.
- In terms of domestic settlement services, EPIF supports the establishment of domestic settlement services by four-party schemes (e.g. Visa Europe National Net Settlement Services & MasterCard Intra-country settlement services) as a pro-competitive initiative.
- Implementation of these domestic services has not been effective at domestic level in some markets for several reasons:
 - These schemes do NOT settle transactions in all currencies within the EU in their settlement accounts, resulting in the need to establish a bank account with a settlement agent in these markets;
 - In some member states ONLY domestically registered banks can have settlement accounts with settlement agents, which adds material cost for PIs to offer domestic services in some cases, and
 - Scheme rules mandate participation in domestic settlement services for some markets, which restricts the ability of PI's to enter domestic markets – particularly for e-commerce transactions.
- A practical example of this is Hungary, where international schemes do not allow for Forint settlement in their accounts. Local law requires that only banks may participate directly in the domestic settlement service and a scheme mandate exists that domestic transactions MUST be processed via the central bank.
- In order to achieve a level playing field, European legislators should ensure via an article or a recital in the revised PSD that:

- Four-party schemes (in which settlement obligations arise directly between participants) must provide the ability to settle domestic transactions for all domestic currencies within the EU for domestic currencies – this will facilitate cross-border acquiring within all markets and address the issue of domestic banking rules acting as impediments, and
- Four-party schemes must not mandate participation in domestic settlement services via a domestic agent only, but must also provide for settlement within scheme accounts in the relevant local currency.

CONCLUSION

Finally, EPIF welcomes the opportunity to engage further with relevant EU Institutions on the issues highlighted above. EPIF would be happy to provide any technical input or any other helpful information, including the substantiation of the points made above or with regards to explaining how the different PSD Rules apply to the different business models we represent.

For more information about the PI sector, the EPIF organisation and its members or our position papers, please contact us via our website or secretariat.

