European Payment Institutions Federation aisbl

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EPIF Position Paper

Commission Staff Working Paper on AML Supervision Of, and Reporting By, Payment Institutions in Various Cross-Border Situations

EPIF welcomes that the Eur. Commission (EC) is starting to provide guidance to supervisors and the industry on aspects of the supervisory, passporting and reporting regime applicable to Payment Institutions (PI) and their agent network. Such guidance, in particular also on Anti-Money Laundering and Couter-Terrorism Financing (AML/CFT) aspects, is currently lacking.

However, this Working Paper (WP) has not been discussed with the PI industry, and some of its proposals and implications are a matter of concern for EPIF. In other aspects, the WP is not ambitious enough. Therefore, EPIF has decided to summarize its key concerns and proposals in this Position Paper. EPIF members also felt that it was necessary to underline the diversity of business and operating models in place for the provision of payment services in the EEA. Obviously, the agency model is only one possible operating model for PI, alongside own branches, small/waived PI or (pure) online service provider to name a few.

Specific Points – High Priority

1. **CDD required for every occasional money transfers (current practice in many EU Member States) - not in line with FATF guidance (p, 3, 3rd Para)**: In practice, many supervisory authorities require PI to conduct customer due diligence (CDD; incl. verification of the information provided) for all occasional money transfers (MT) regardless of the amount sent (see country example Spain below). This means that even a MT of EUR 1 is in practice subject to the full set of CDD requirements, providing a disproportionate and arguably unnecessary burden on MT (from a RBA view), with negative implications on financial inclusion and fuelling the already sizeable informal MT sector. However, in cases where the firm believes it likely that there will be 'an element of duration' to the relationship between the firm and the customer, CDD is conducted as required by law.

More guidance, harmonized on the EU level, is necessary to ensure a consistent regime applies to all firms, in particular also in a cross-border context. The FATF guidelines require CDD to apply to wire transfers above USD/EUR 1.000. The WP could be misleading to the reader since it assumes CDD to apply for occasional transactions above EUR 15.000 only.

2. **EC suggestion that agents of PI could be considered 'financial institutions' in a possible revision of the 3rd AML Directive (p. 3, last Para and Footnote 2)**: An agent of a PI may be a financial institution in its own right (e.g. a bank), but it can also be a retailer or mobile network operator. The PSD was enacted to enable more competition in the EU market by eliminating the pre-PSD existing constraining requirement in some EU Member States that payment services could only be offered by regulated financial firms. Therefore, re-introducing a constraining requirement to the PSD regime via the back-door (e.g. the revision of the 3rd AML Directive) would go against the spirit of the PSD and should thus be avoided and not advocated by the EC. In practice, such a change would serve as a strong disincentive for many potential retail agents from entering the payments market as an agent, to the detriment of the EU consumers and the Single Market as a whole. Since the PIs remain responsible for all acts and omissions of their entire agent network, including AML obligations, the current approach should not be changed without any overriding necessity.

3. **EC suggestion that host country supervisory resources restrict agent network in host country (p. 6, 2nd Para)**: The EC seems to indicate that the number of agents in a given EU Member State could be restricted if the resources of the competent authorities in the host state B are not in line with the number of agents in state B. This view, not supported by the letter or spirit of the PSD, seems misguided: similar considerations are nowhere to be found in other sectoral EU financial supervisory arrangements (e.g. the banking regulatory framework). Given that the supervision of the activities of the PI and its agent network remains primarily a responsibility of the home supervisory authority, the resource constraints of the host country regulator should not be a restricting factor for the growth of the cross-border

PI industry. Some EPIF members argue that this issue could be efficiently addressed also via an increase of regulated PI (incl. 'small' or 'waived' PI) across the EEA as this could create more income for supervisory authorities.

4. **Blanket discreditation of retail agents regarding their suitability to provide payment services (p. 7, 3rd Para.; p. 10, 3rd and 4th Para)**: The EC seems to accept that host country authorities can categorically reject all proposed retail agent in their territory due to a perceived general increase of the risk of ML or TF. This is a clear deviation from the letter and spirit of the PSD. It is furthermore disproportional and not necessary. The PSD cannot be interpreted as providing host Member States with such broad powers – their powers are limited to an individual, case-by-case, evaluation. Otherwise, the very purpose of the PSD's market liberalization effects (incl. opening up the agency model to include retail agents) would be compromised.

Some EPIF members argue that this issue could be efficiently addressed also via an increase of regulated PI (incl. 'small' or 'waived' PI) across the EEA as these could chose to act as agents for other firms if they so chose.

5. The EC, in its role as advocate for the Single European Market, should not plead for a supervisory approach which goes against the spirit of the PSD. On the contrary, it should ask why a properly trained retail agent would increase the risk of ML/TF taking place in host country B, also in light of the existing sizeable informal MT sector in all EU Member States which escapes any supervision and reporting requirement.

6. Retail agents have been providing payment services on behalf of authorized principals in several EU Member States for many years (e.g. Italy, UK) without these restrictions being applied or being necessary. Such blanket restrictions would thus not be proportionate or necessary. Competent authorities can develop concrete AML training requirements for retail agents if needed, but cannot blankly discredit a whole category of agents.

7. In the last years, the PI industry has made substantial investments into their retail agent network, and the related AML controls and trainings. The EC should abstain from indicating that home or host authorities can reach blanket conclusions not to register, or even de-register, existing retail agents without a case-by-case analysis, and proven and attestable ML/TF risk which make a refusal to register, or even a de-registration, necessary.

Specific Points – Medium Priority

i. **Applicable laws in a freedom to provide services context (p.1, 4th Para)**: The EC view that the "transparency and conduct of business rules (COB)" of the host country (B) need to be 'respected' seems to contradict the spirit of the single passport principle when providing services cross-border (on the basis of the freedom to provide services), without any physical infrastructure used in the host country B (e.g. an online remittance service). There is a lack of clarity in general which COB requirements should apply when the service is provided by an online service which originates in the home rather the host country. It would be advisable for the EC (legal services) to clarify which conduct of business (COB) rules apply in each case.

ii. **Agents are form of establishment in host country (p.4, 5th Para)**: EC cites ECJ case law supporting its view that agents are a form of establishment if they are authorized to act on a permanent basis for the PI/undertaking. Main ECJ statement in case *Winner Wetten*: "*freedom of establishment may be triggered if local presence consists merely of an office managed by a person who is independent but authorized to act on a permanent basis for that undertaking*". EPIF proposes that this should be decided on a case-by-case basis, taking into account the 3-prong test developed by the EC to determine whether an agency arrangement leads to 'establishment' or not.[1] Clearly, not every agency agreement would qualify. Many open questions remain: what is meant by a "*on a permanent basis*"? A one-year renewable contract? 2,3 or 5 years?

iii. **"Preventative powers" of the PI's Home Member State (p.6, last para)**: the role of the home state supervisor should not primarily be a 'preventative' one, but rather a supportive and guiding role. PI should not be discouraged from engaging agents (including cross-border), but they should be guided and appropriately supervised in doing so. Some EPIF members argue that this issue could be addressed also via an increase of regulated PI (incl. 'small' or 'waived' PI).

[1] See EC Interpretative Communication (1997): http://ec.europa.eu/internal_market/bank/docs/sec-1997-1193/sec-1997-1193_en.pdf

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ABOUT US

EPIF represents the interests of the payment institution sector at European level. Its members represent the broad range of business models covered by the Payment Services Directive (PSD) and include companies and national associations from every part of Europe. EPIF seeks to represent the voice of this industry with EU institutions, policy makers and stakeholders. It aims to play a constructive role in shaping and developing market conditions for payments in a modern and constantly evolving environment.