European Payment Institutions Federation aisbl

15 April 2014

EPIF POSITION ON THE PAYMENT SERVICES DIRECTIVE 2

ABOUT EPIF (EUROPEAN PAYMENT INSTITUTIONS FEDERATION)

EPIF, founded in 2011, represents the interests of the non-bank payment sector at the European level. We currently have over 175 authorised payment institutions and other non-bank payment providers as our members offering services in every part of Europe. EPIF thus represents roughly one third of all authorized Payment Institutions in Europe.[1] Our diverse membership includes the broad range of business models including:

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

EPIF seeks to represent the voice of the PI industry and the non-bank payment sector with EU institutions, policy-makers 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 a 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 payment users (e.g. via mobile and internet).

EPIF is glad to share its position on the draft Payment Services Directive 2 (PSD2) with EU policymakers.

[1] According to the Eur. Commission, there were 568 authorized Payment Institutions in Europe as per end 2012.

1. SAFEGUARDING

- The **proposed PSD2 text has deleted the current sub-paragraphs 3 and 4 of Art. 9**, which included the Member State option to require safeguarding to apply to PI which only provide payments services. Given the maximum harmonization approach, it remains unclear which effect the suggested deletion has. The current reading of the text would suggest that safeguarding does not apply to PIs anymore which do not, at the same time, engage in another activity.

- **The use of "safeguard" and "segregate" in Art. 9 of the PSD 2 is not entirely consistent**. The absence of any clear guidance on the distinction between the two obligations means that the rules are open to interpretation by stakeholders in Member States and potential inconsistency in application between payment service providers. The current requirements do not take account of the necessity for smaller PIs, to use customer funds to guarantee customers' orders. We also seek clarity on the types of funds which need to be segregated (i.e a clear definition of "funds"). The definition of payment services is not applied consistently; and some payment services are hybrid by nature. There are instances in which funds held by the financial institution are inclusive of fees and charges payable by the customer or fees owned by the scheme to the card acquirer/issuer. One example is when a merchant acquiring business receives funds from the schemes. The European Commission would appear to support a purposive interpretation as per its FAQs ID 1037 and ID 1065.

- It is necessary to **measure the consequences of such amendment to the safeguarding rules on the treatment of PIs by payment systems (Article 29 of the PSD2)**. PIs (hybrid and non-hybrid) have to prove that they have the capacity to comply with the rules of payment systems. PIs cannot cover their undertakings under the systems by their own funds. They need to have the possibility to use customers' funds to guarantee customers' orders passed through the system and which are irrevocable as of the time of receipt of the order by the system. Each Member State has its own interpretation of the applicable safeguarding method. Such rules have to be fully harmonized to facilitate the access on payment systems and to avoid any domestic favorable treatment. It is necessary to provide the same opportunity of using customers' funds to guarantee customers' orders in the payment systems in the same conditions for hybrid or non-hybrid PIs in any Member State. The safeguarding requirement as interpreted in various Member States does not provide the opportunity to do so.

- **PSD safeguarding provisions in the context of acquiring do not accurately reflect the contractual relationships and operating models which form the basis of the relationship between the parties in a three or four party model scheme**. The draft PSD2 text does not recognize the separate and distinct contractual relationships which exist between a card issuer and its cardholder and that between an acquirer and its merchant. This is because there are a number of situations where merchant acquirers do not immediately settle all funds received from the Card Scheme e.g.

- Where fraud is suspected and funding withheld pending investigation;
- Where 'net settlement' arrangements have been agreed and interchange, processing costs and (any) chargebacks are deducted, usually on a daily basis;
- Where merchants have agreed longer funding cycles in order to minimize bank charges; or
- Where merchants have agreed to funds being retained to repay an acquirer debt or to build a security reserve to cover processing liabilities;

- **This distinction is particularly relevant when the definition of the "relevant funds" is considered**. Its application remains ambiguous when applied to card acquiring and should be clarified[1]. The payment of amounts due to a merchant from its payment service provider should primarily be subject to the commercial terms agreed between the merchant and acquirer. Parties should have the freedom to agree these terms to allow the factoring in of fundamental risk management considerations which may be necessary to deal with the contingent risk when the acquirer is unavoidably faced with when it processes card transactions.

- Furthermore, some safeguarding mechanisms allowed by the PSD are not always feasible or even available to PIs, such as insurance cover.

2. OWN FUNDS

- The PSD includes stringent prudential capital requirements, but there is a lack of clarity in parts. **Assuming the funds' requirements exceed the initial capital (Art. 6), there are no definitions of the qualifying items that may be used to meet the additional funds' requirements**. This Article gives Member State national discretion. EPIF suggests referring to the definition of own funds of Regulation 575/2013/EU (Art. 4(118): "own funds" means the sum of Tier 1 and Tier 2 capital). EPIF warns that any reference here to Art. 12 of the Directive 2013/36/EU (Tier 1 capital only) may be inappropriate because it has been set up exclusively for credit institutions. Credit institutions are carrying out the business of taking deposits or repayable funds from the public (Article 4(1) Regulation 575/2013/EU) while PSD2 provides that PIs do not receive deposits or repayable funds (article 17 PSD2). Applying Directive 2013/36/EU to the definition of the PIs' own funds will be harmful to start-up PIs because it will prevent them to benefit from Tier 2 capital instruments, such as subordinated loans or frozen associate current account.

[1] Consistent with the contractual relationships which exist, merchant acquirers generally receive payment of funds directly from the card schemes in respect of card transactions processed and not from a payment service user or a payment service provider.

3. ACCESS TO BANK SERVICES IN HOME AND HOST MEMBER STATES FOR PAYMENT INSTITUTIONS

- **PIs need access to bank services in the countries they operate in order to provide their authorized payment services**. These bank services include the opening and maintenance of a bank account or basic settlement services. As a matter of fact, many Payment Institutions are facing challenges in opening or maintaining bank accounts across Europe.

- **Access to bank services has proven challenging for many 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.

- We emphasise that in the UK and France for instance, many PIs are held back by the lack of easy access to banking facilities. Many UK and French banks have effectively adopted a policy not to open accounts for PIs. In the UK, this means that PI accounts were (prior to September 2014) are disproportionately concentrated in one bank for example (i.e. Barclays) – 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.

- **In fact, the one bank which was providing services to 70% of the UK money remittances market has now exited the sector (as of 30th September). This means as many as 200 Authorised PIs could be without bank accounts, since no other UK bank is willing to serve the money remittances sector**. The bank concerned has given no clear reason for its decision, although it has referred to the perceived money laundering risks. However, the bank has not been able to point to any specific case in the UK where a PI has been found either deficient in AML controls or even a case where a UK PI has been involved in financial crime offences. For PSD2 to be effective in delivering more competition in payment services, it is important that adequate consideration is given to the operation of the AML regime as it applies to the PI sector. **The UK government has responded to the crisis in availability of banking for money remittances firms by setting up the Cross Border Remittances working group, with representatives from government, regulators, industry and consumer groups**.

- **A similar situation occurs in Spain. The behaviour of banks in Spain whereby they close bank accounts belonging to PIs or refuse to allow them to open accounts has been held as an act of unlawful competition by the Spanish courts of justice**. Rulings were handed down to this effect by Section 15 of the Provincial High Court of Barcelona, dated 28 November 2008 and 12 April 2011, the ruling of the Commercial Court no. 5 of Barcelona, dated 25 September 2012, the ruling of the Commercial Court no. 1 of Bilbao, dated 10 October2012 and the ruling of the Commercial Court no. 2 of Bilbao dated 4 January 2013. On 20 December 2013, the Provincial Court of Vizcaya confirmed a

previous ruling of the Commercial Court nº 1 of Bilbao, in which the Court understands that the closing of bank accounts is an act of unlawful competition and orders the defendant banks to reopen the accounts of the PI.

- Further, **some banks across several Member States have decided not to provide bank services to PIs that offer independent third-party payment initiation services**, a type of payment solution that competes with bank-sponsored payment solutions. These banks are not willing to open or maintain a bank account for an independent third-party provider of payment initiation services. This behavior effectively prevents non-bank financial institutions from offering their payment services in an efficient and compliant manner. Banks should not be allowed to control access to the domestic settlement and financial infrastructure in a manner that effectively prohibits competition.

- 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 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. Art. 17 (2) of the PSD 2 goes in this direction acknowledging that Member States shall ensure that access to payment accounts is proportionate. Further clarification of this subparagraph is however necessary to ensure this issue is being addressed adequately.

We therefore believe that the PSD2 Directive should include:

- A requirement that **banks may not refuse to open or cancel an account relationship for a PI** unless the credit institution, following an examination of the use of the account and the transactions performed by the payment institution, has concluded in a well-founded manner that said transactions present unbearable risks from a perspective of money laundering.

- A **dispute resolution mechanism for situations in which a PI is denied access to bank accounts** shall be established. This mechanism would ensure the proportionate access to bank accounts to PIs without overburdening banks.

4. THIRD PARTY ACCESS TO PAYMENT ACCOUNTS

- Initiating payment services are expected to deliver faster and cheaper payment means to consumers. **Thanks to their safety, convenience and economic efficiency, payment initiation services and account information services will bring significant benefits to European consumers** and contribute to the integration of the European payments market.

- **It is important in this context that third party access to the payment account must not be made dependent on the consent of the consumer's account-servicing bank.** As payment initiation services and account information services compete with banks' own payment solutions, banks would then have an incentive to try to determine the conditions on which such competing payment solutions are provided and thereby potentially exclude or block third-party-providers. Third Party Providers should not be required to enter into a contractual agreement with the account-servicing provider to provide payment initiation services.

- It is also important for the efficient provision of payment initiation services that regulated PIs that provide such services are ensured access to domestic settlement and financial infrastructure by having the right to open and maintain standard bank accounts across banks in Home and Host Member States (as already described in Recommendation 3 of this document, "Access to bank services in home and host member states for payment institutions").

- Third Party Providers of payment initiation services should be enabled to compete with other PSPs on a level playing field. As such, they should comply with the same rules and requirements as other PSPs. They should however not be discriminated against through e.g. the introduction of special clauses and rules which are only applicable to Third Party Providers.

- EPIF has published a specific position paper on Payment Initiation Services which is available on our website.

5. 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 close to 600 PIs have been authorised to provide their services across borders EU wide, alongside 2100 small or 'waived' PIs which only provide their services within one EU country. 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 further room for improvement in the PSD 2.

<u>12 month limitation for credit extension (cross-border)</u>

- The PSD incorporates restrictions on passporting that undermine the key aims of fostering competition and developing a single internal market for payment services, and indeed seem in direct conflict with basic EU Treaty principles such as the free movement of services and the freedom of establishment. One **problematic example is the limitation in new Art. 17(4)(b) on the ability of PIs to passport payment services involving the extension of credit with a repayment term exceeding 12 months**. Therefore while the PSD has allowed PIs to passport charge card businesses ("charge cards" being cards requiring repayment of the balance in full each month), this

provision prevents PIs from doing so for credit card businesses. This is because "credit cards" allow the cardholder to revolve balances beyond a one month period, potentially beyond 12 months therefore Art. 17(4)(b) effectively prohibits PIs from issuing credit cards outside their home countries, fundamentally hampering the single market objectives of the PSD and ultimately driving a wedge through the middle of an otherwise vibrant and competitive card issuing sector across Europe.

- **EPIF urges the Commission to remove the restriction in Art. 17(4)(b)**, in particular as it involves a breach of the fundamental EU Treaty principles of the free movement of services and establishment.

Enhancing cooperation between competent host and home authorities

- There is currently 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 cooperation practice should be improved. Also, the role of the host regulator in relation to PSD conduct of business rules and/or PI reporting should be more precisely defined to avoid potential duplication of reporting obligations and confusion amongst PIs and regulators.

- In that regard, **EPIF welcomes that the proposed PSD 2 (Art. 26) gives additional powers to the European Banking Authority (EBA)** to address the PSD passporting process and exchange of information between home and host authorities via the adoption of regulatory technical standards and guidelines. EBA's involvement in standard setting is clearly a positive development which could potentially lead to more consistency and harmonisation of rules for cross border active PIs.

- **EBA needs to be given adequate resources** in order to be able to fulfill these new duties. As for the standard setting process led by EBA it is important to ensure that the non-banking industry is represented and consulted whenever new guidance and/or technical standards relevant to the PI sector are discussed.

- In the context of the provision of cross border services, EPIF advocates against providing supervision powers to Host Member States, as it would offset the inherent benefits of the single market and introduce market fragmentation, business disruption as well as legal uncertainty.

Member States discretion in applying requirements

- By allowing Member States to apply discretion in the application of certain rules, the ability of PI's to passport in different Member States it is hindered and the application of different requirements on a country by country basis creates barriers to homogenous expansion on a cross border basis. An example is the waiver included in Art. 54 (3) of the PSD 2 treatment of microenterprises which is leading to significant variation between Member States in terms of the Directive's implementation.

6. ACCOUNTING

- The PSD includes requirement of separated accounting of the payment services from the closely related ancillary services. EPIF questions the relevance of this separation for a non-hybrid PI. The prudential requirements should be looked at in their totality. **EPIF suggests to limit the scope of separated accounting requirement to hybrid PIs only** (as defined in Art. 17-c).

7. USE OF AGENTS

- The PSD recognises the market reality that many payment institutions, specifically those operating money remittance services offer their services to customers via an agent network. **Agents are third parties which offer the payment service on behalf of the Payment Institution**. These agents can be authorized financial institutions such as banks or postal organizations, or non-financial institutions such as retail chains. 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.

- **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 group of people screened varies greatly between Member States, creating an unlevel playing field. A harmonised "fit & proper form" could be part of a new Annex of the PSD 2 or the EBA could work out a standard F&P form and related document needs.

- **Importantly, it should be clarified in Art. 18 of the PSD 2 that the fit & proper assessment need does not apply to the management of properly authorised and supervised EU financial institutions** which are already subject to such rules (e.g. banks or insurance groups). This is an unnecessary duplication of rules and can serve as a disincentive for financial institutions to serve as an agent. We suggest adding specific language to Art. 18 (1) (c) to exempt PSPs serving as PSD agents from the duplicative fit & proper requirements.

- Finally, **EPIF welcomes the PSD 2 proposal for an EU registry for PIs**, their branches and agents which should be managed by EBA.

8. SURCHARGING

- **Surcharging** is the practice whereby the merchant charges his client an additional fee for the use of a particular means of payment**. It is an inherently unfriendly consumer experience**. **As well as**

forcing consumers to "pay for paying"', it also serves to mislead customers on the true price of goods and services. Indeed, as BEUC has recently stated: "*Companies have shamelessly used them [surcharges] to reap extra profit from people paying by card. Such practices rightly annoyed Europe's consumers as they essentially punished them when making a payment.*" We therefore welcome the recognition that surcharging is anti-consumer.

- Nevertheless, EPIF urges policymakers to **go further than the current proposals and ban surcharging altogether in the interest of consumer protection**. As the European Commission is aware, surcharging of card payment transactions is already prohibited in nine Member States at present and it would seem prudent to extend this to the whole of the EU. The current proposed solution will only lead to greater confusion and frustration for consumers who will be faced with different surcharging experiences depending on which card they choose to use and at which merchants.
- Operationally, **selective surcharging** would in particular be cumbersome for merchants and their customers to implement and understand. For example, merchants' employees would have great difficulty differentiating between price regulated and non-price regulated card transactions.
- EPIF therefore urges policymakers to take a pro-consumer *and anti-money laundering* stance by banning surcharging altogether.

9. OPEN ACCESS REQUIREMENTS

- **The European Commission proposes to extend the "open access" requirements of Art. 28 of the PSD to smaller, proprietary networks with licensees**. This significant change to the position under the PSD is likely to make it significantly more difficult for such smaller, proprietary networks to compete with Visa and MasterCard and does not reflect the EU business model of these networks.
- Three-party schemes' freedom to select financial institution partners is fundamental to their ability to build scale and relevance and to compete in an industry dominated by inter-bank schemes.
- **Three-party networks, including those with licensing partners, are currently exempt from the "open access" requirements of Art. 28 of the PSD**. The exemption wording was carefully drafted to reflect fundamental contrasts in network structure with "four-party" networks. The measure reflected the Commission's view that access to "three-party" schemes is not necessary for market entry. It was also adopted by the European Central Bank in its 6th SEPA Progress Report in 2008 and incorporated by the European Payments Council in v2.1 of the SEPA Cards Framework.
- Nothing has changed since that time to justify a shift in policy, yet the exemption is not present in the revised PSD, nor has any rationale been given for such a significant change.

- Far from creating a 'level playing field', the removal of this exemption will significantly disadvantage smaller non-bank networks, reducing competition, innovation and consumer choice.
- **We urge policymakers to preserve the exemption for "three-party" networks with licensees in Art. 28(2)(c) of the existing Payment Services Directive.**

10. LIABILITY FOR UNAUTHORIZED TRANSACTIONS

- **As it was the case with Art. 58 of the PSD, Art. 63.1 of PSD 2 remains vague and open to various interpretations regarding the liability for unauthorized transactions**.
- Also, the system is potentially open for abuse. The **immediate refund policy can create significant abuse from cardholders**, who might deliberately issue claims close to the 13-month threshold, leaving payment service providers (PSP) defenseless, as they will lack the necessary means to properly investigate.
- To illustrate this point, we can look at any disputed transaction. If a consumer waits more than 12 months to issue his/her claim, for instance, all the steps that banks or PIs have to take to collect information (transaction records, dispute documentation, etc.) make the procedure incredibly inefficient. PSPs compliance is feasible but time-consuming and costly from a back-office perspective (after 2 or 3 months the information is normally stored in off-line systems –not immediately available, so a query has to be officially raised through technical applications and information might sometimes be less detailed an therefore less helpful for fraud investigation-). And even when the consumer claims way before the 13-month cap , in some Member States Payer's PSPs are required to immediately refund payers, and after that to trigger a process to recover the money from the cardholder (with all the costs involved). If that unjustified claim is effected by the cardholder before 120 days, the card schemes disputes procedures are available (issuer can charge the transaction back –if there is a legitimate reason to do so –) but this will not only damage payer's PSPs (i.e. issuing banks or PIs) but also payee's PSPs (i.e. acquiring banks or PIs), as both incur in unacceptable and disproportionate operational costs for which they will get no compensation, even if in the end it is proved that the claim was not appropriate. It is also key to bear in mind that in almost all of the payment services covered by PSD2, payers (i.e. cardholders/consumers) receive their monthly statements from their PSPs (i.e. issuing banks or PIs) at least on a monthly basis, so it is not reasonable that they can make use of that 13-monthperiod.
- Provided all the above, **the complaint timeframes should therefore be shorter (never more than 3 months)**, thus promoting not just efficiency but also fairness for all parties involved (consumers and PSPs) and better fraud and risk prevention policies.

11. AGGREGATORS AND MARKETPLACES

- **Aggregators and marketplaces (such as Amazon) are increasingly relevant for online and offline commerce and payments** although the various models in operation vary substantially. Typically, aggregators or marketplaces in this context may sell on behalf of smaller merchants and/or handle the payment flows. As the business models and operations of these businesses are new and evolving, they are not yet given a precise definition at this point in the PSD or by regulators, payment schemes or industry standards.
- **A key feature of marketplaces is that the acquired merchant (who operates the marketplace) may have many sub-merchants with which the acquirer may have no contractual or settlement relationship**, e.g. a merchant selling goods on a marketplace may be paid by the marketplace, not the marketplace's acquirer. Depending on the nature of the model, in providing settlement service to its retailers (sub-merchants) the marketplace may be providing a payment service or relying on an exemption in the PSD (e.g. limited network or commercial agent).
- **It is not sufficiently clear how the PSD applies, particularly in respect of 1) relevant anti-money laundering obligations and 2) handling sub merchant settlement funds,** to various e-commerce developments, including aggregators and marketplaces, and their interaction with the acquirers and sub-merchants. We have observed differing approaches between Member States, including some treating aggregators as merchant acquirers in their own right or as money remitters, or treating them as (unregulated) intermediaries of the merchant acquirer and/or sub-merchant.
- **EPIF believes that the European Commission should clarify the application of the PSD to merchant aggregators/marketplaces and similar models.**

12. PAYMENT TO MERCHANTS

- **The PSD 2 should provide greater clarity on the relationship between a payment institution and its merchant customers**. 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, as Art 74.3 of the PSD 2 seems to allow. EPIF is aware of the current trend towards **faster payments**. However, the reflection of this trend in **legislation must be limited to what is really necessary** to attain the objectives of the legislation in this point, i.e. protection of consumers, and not disproportionally limit the contractual autonomy of the parties in the b2b sector.
- As currently drafted**, Article 78** of the PSD 2 **does not recognize the current acquiring model**, as it generally mandates (in contradiction with Article 74.3) Payee's PSPs (acquiring banks or Payment Institutions) to fund their Payees (i.e. merchants) the day after the transaction date. This **does not**

mirror the business reality as **most Payees** (especially in the card-not-present space and in certain countries, such as the UK) are precisely the **ones interested in agreeing longer payment timeframes**, which will allow them and their **PSPs to better manage fraud and risk** (as already explained in section 4 -Safeguarding). as well as to **afford the service charges and banking/account fees**. To illustrate this, below there are a number of situations where Payee's PSPs do not immediately settle all funds received from the Card Schemes, as for instance: where fraud is suspected and funding withheld pending investigation; where 'net settlement' arrangements have been agreed and interchange, processing costs and (any) chargebacks are deducted, usually on a daily basis; where merchants have agreed longer funding cycles in order to minimize bank or service charges; or where merchants have agreed to funds being retained to repay an acquirer debt or to build a security reserve to cover processing liabilities. Please let us call your attention on the fact that some of these scenarios mirror Card Schemes regulations, the intention of which is to protect the payments system's stability.

- EPIF is supportive of the need for **maximum execution timelines for payments and for funds** to be at the **disposal of the beneficiary within set timeframes** where this is necessary to protect consumers. However, in the interest of security, fraud prevention and compliance with other national regulations (as well as industry standards, such as Card Schemes Operating Regulations), it is necessary that the Directive reflects, specifically in Article 73, the need for **financial institutions to have to carry out additional checks and controls** which especially for certain cross border payments, may take longer.

- In addition to this, the text of the Directive should be reflective of **the different types of payment services** and how these are operated within the market. For instance, with the **acquiring of card-initiated payment transactions**, the payment obligations of the cardholder are discharged by use of the card, and funding flows are agreed separately between the merchant and its payment service provider, and taking into account the need to accommodate requests for flexible funding periods, the execution time requirements should be subject to flexibility as appropriate for risk management purposes. Without such tools merchants would be in a position where they could not afford the service charges and banking/account fees that result from D+1 applied to their sales volume.

- **Acquiring services support a multitude of different industries** all of which have **specific payment dynamics to the goods and services they provide.** Whilst some goods and services are immediately delivered upon and so the customer receives immediate and full value on their transaction, others may be subject to future delivery or even a stepped delivery period (as in monthly memberships paid for annually, or an annual insurance policy**). Acquirers operate under Payment Scheme Rules** (principally those laid down by Visa & MasterCard) **which obligate them to effectively underwrite each and every transaction they process**. This obligation, drawn down on via the **chargeback process, creates a contingent liability window** that can extend up to 540 days from the time the transaction occurred, or from the point where future delivery was scheduled to have been fulfilled (such as with a holiday). It is this contingent credit risk that underwriting teams must understand in

the context of the financial standing of each and every merchant, and which may then factor into the conditions applied in order to offer a merchant facility. The **contingent credit risk crystallizes in the event that chargebacks are passed to the acquirer via a customer's card issuer and that the acquirer is then unable to pass these through to the merchant for reimbursement**. In such circumstances, in the absence of delayed settlement funds or other security mechanisms from which to net against, the acquirer would stand the loss.

- **Big retailers and multinational merchants** have generally the **bargaining power** to impose **settlement/payment terms**. It is important to note that the timeframes currently contained in PSD1 and the proposal for PSD2 do not take into account the interest of medium and smaller merchants, which are the ones normally interested in longer settlement timeframes. **With D+1 the level playing field will be at stake.**

- There are also practical reasons why it is necessary to **extend the settlement timeframes in certain circumstances.** The faster payments trend is meant to **protect consumers**, not merchants and other professional market participants (such as big retailers) who have **the benefit of being able to individually negotiate the terms of their engagement with the merchant acquirer**. Moreover, the security of certain payments cannot be guaranteed if settlement is performed as fast as this trend anticipates, especially where settlement relates to large volume transactions. The speed of settlement does also not take into account the credit risk borne by the market participants when charge backs, refunds and rejections need to be deducted from the settlement funds at various stages. The wording of **the revised PSD should clearly recognize (specifically in Art. 73.2 and 78.1) that the payment timeframe in which the payee's PSP funds the payee may be agreed between the parties involved** (in line with the wording of Art. 74.3). In the case of merchant acquiring the movement of funds between issuer, card scheme and acquirer is not dependent upon the acquirer's obligation to settle the value of transactions processed to its merchant. Moreover, as already mentioned, Payees and Payee's PSPs need some days to prevent, detect and counter potential fraud, during which funds should be withheld. Therefore, EPIF advocates that **the PSD should recognize the requirement that a payee and its PSP may decide the payment timeframe in which funds are remitted by an acquirer PSP to its merchant payee** to allow for prudent risk management measures to be accommodated within the payment terms.

- The same rationale applies to **e-commerce platforms**, which - according the Commission proposal – will no longer benefits from the commercial agent exemption and be in scope of the Directive. As a consequence, the Directive needs to be amended to accommodate the e-commerce platforms business model. As they currently stand, the execution timeframes of the Directive frustrate the main objective of e-commerce platforms: i.e. increase safety and security for the buyer (the payer) by holding the payment until a certain timeframe has elapsed or the seller (the payee) has fulfilled agreed conditions (e.g. has shipped the goods purchased by the buyer). This is clearly in the interest of both buyers and sellers (similar to classic escrow setups) and needs to be adequately reflected into the Directive.

- 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.

- Moreover, Article 74(3) **of the PSD 2 remains unclear as to its application to card transactions**. The European Commission had provided some clarity in its Q&A's that **some payment transactions could be executed as agreed between the parties**. The Q&As give detailed guidance on the difference between 'payments transaction initiated by payee' or 'payment transaction initiated through a payee" (Question 102), on "agreed due date" (Question 88) and more importantly in Question 107.2 which states "Card transactions have to be executed within the time limits agreed between the payee and his payment service provider (contractual freedom)". EPIF invites the European Commission to include its own guidance in respect of these issues from the PSD 1 Q & A's in the text of the Directive. EPIF strongly invites the Council to reconsider Article 78 and clarify Article 74(3) in light of the above and of the different commercial reality of how card transactions work.

13. SECURITY REQUIREMENTS

- **The PSD2 text contains a list of new authorization requirements for PIs (Art. 5), which relate to new security related conduct of business rules** (also contained in Chapter 5 in Art. 85-87). It will be important to clarify these new requirements and how they apply to the different PI business models authorized under the PSD. Also, the interplay between these new PSD 2 standards, any new EBA rules in that context, and the existing payment security standards which the European Central Bank has issued in 2013, needs to be clarified.

- Chapter 5 of the proposed PSD 2 makes several cross-references to the *Network and Information Security (NIS) Directive* which is currently debated in the European Parliament and Council. While EPIF supports the public policy goals of safe and sound payments, it appears risky to bind the PSD 2 to the NIS Directive which is still subject to change and which was previously only meant to apply to credit institutions, not all PSPs. **Given the broad range of new security related requirements for all PSPs, we think that these requirements should apply taking into account the different business models (size and type) based on the principle of proportionality. The level of security requirements shall also be applied using the risk based approach. Also, Art. 85 (4) of the PSD 2 might be interpreted in an overly onerous manner, which could outweigh the potential benefits**. The requirement to notify payment service users should only apply where there is a *"**material** security incident that is **likely** to impact the financial interests of the payment service users*". More clarification is also needed as to what would be deemed as "*financial interests of users*" and the circumstances under which users must be notified of a security incident. Practical questions arise in

which manner a PSP can contact its users if no business relationship has been established between the PSP and the user.

- **Lastly, Art. 87 requires all PSPs to apply strong customer authentication when a payer initiates an electronic payment transaction**. It is current unclear which transactions are subject to these new security requirements. More analysis is needed to understand how such a requirement applies in the context of a transactional payment service, i.e. when no business relationship has been established with the payment services user. **The new security requirements should not discriminate one business model (i.e. the account based business model) versus another (i.e. the transactional business model). EPIF believes that this requirement should apply in a proportionate manner in order not to have unintended consequences mainly on small PIs.**

- Also, our understanding is that this requirement only applies to Internet payments and only to the flow between payer and payee (and not to the ones present throughout the rest of the payment chain). Therefore, EPIF supports the clarification of the proposal's wording in line with the above.

- In many parts of the new text, there are references made to the **standards adopted in the ECB SecurePay forum on the security of internet payments (e.g. Art. 5(f)). These individual references should be deleted and instead it should be made clear that all of the SecuRe Pay Forum Recommendations apply to PSPs.** Also, given the different transposition timings, by the time the PSD2 is transposed, PSPs will - most likely - already have to be in compliance with the ECB recommendations as transposed by the relevant Home State's Authorities. The current approach creates unnecessary duplication. It is also unclear whether the ECB Recommendations apply to non Euro Member States. The ECB has a direct mandate over Euro countries only. Any difference in enforceability/application would be resolved by a clear reference to them in the PSD2.

- Finally, EPIF would recommend the PSD2 acknowledging that PSPs will have to deploy strong authentication proportionately to different business models. This approach correctly reflects the ECB recommendations, which provide for technologically neutral, non-prescriptive authentication and for the adoption of measures based on the actual risk presented by each merchant and transaction.

14. OUT OF COURT REDRESS

- The European Commission proposal proposes an ambitious timetable for the handling of complaints. **In most cases PSPs need longer than 15 business days to properly investigate a complaint and provide appropriate resolution for the Payment Service Users** (as provided in Art. 90 of the PSD 2). Furthermore, it is unclear what the rationale would be for introducing a timeframe, and such a short one, including what demonstrable customer detriment the new provision is aimed

at addressing. Therefore, EPIF members would ask that the current provisions of the PSD remain unchanged. If a timeframe were imposed, it should be reasonable and achievable, and in any event must specify that the timeframe does not commence until all relevant information and documentation is provided by the PSU to enable the PSP to investigate and resolve the matter.

CONCLUSION

EPIF welcomes the opportunity to engage further with EU policy-makers on the issues highlighted above. EPIF would be happy to provide technical input or any other helpful information, including reinforcing the points above or to explain how the different PSD rules apply to the different business models we represent.

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