REPORT ON THE CONSULTATION

RETAIL PAYMENT SERVICES POLICY
AND THE PAYMENT SERVICES DIRECTIVE

Contact address: gattj@centralbankmalta.com.

This report contains a summary of responses received by the Central Bank of Malta to its 'Consultative Paper on Retail Payment Services Policy and the Payment Services Directive', published on 28 January 2008. The views expressed herein are those of respondents and do not necessarily reflect those of the Central Bank of Malta. The report does not prejudge the final form or content of any decision or position to be taken by the Bank.

Central Bank of Malta, Pjazza Kastilja, Valletta VLT 1060 Malta.
Telephone: (+356) 2550 0000. **Payment Systems Office (direct):** (+356) 2550 3601. **Fax:** (+356) 2550 2500.
http://www.centralbankmalta.org.
Email: info@centralbankmalta.org.

30 October 2008

ABBREVIATIONS

AML/TF	Anti-money laundering/terrorist financing
ATM	Automated teller machine
B2B	Business-to-business
B2C	Business-to-customer
C2C	Customer-to-customer
ECB	European Central Bank
EU	European Union
MFSA	Malta Financial Services Authority
OFC	Office for Fair Competition
PI	Payment institution
PSD	Payment Services Directive
PSDTG	Payment Services Directive Transposition Group
PSP	Payment service provider
PSU	Payment service user
SEPA	Single Euro Payments Area
STP	Straight-through processing
SPM	Single Payments Market

TABLE OF CONTENTS

1. EXECUTIVE SUMMARY 5

2. INTRODUCTION 6

3. RESPONSES 8

3.1. REACTIONS TO THE CENTRAL BANK OF MALTA'S VISION 8

3.2. TRANSPOSITION OF THE PAYMENT SERVICES DIRECTIVE 8

3.2.1 General 8

3.2.1.1 Use of national discretion 8
3.2.1.2 Transposition date 8
3.2.1.3 Retroactive application of PSD 9
3.2.1.4 'One leg in' transactions 9
3.2.1.5 Provision of payment services to government 10

3.2.2 PSD: Title I – Subject-matter, scope and definitions 10

3.2.2.1 Negative scope (Article 3) 10
3.2.2.2 Definition of 'Consumer' (Article 4(11)) 11
3.2.2.3 Definition of 'Payment Account' (Article 4(14)) 11
3.2.2.4 Definition of 'Agent' (Article 4(22)) 11
3.2.2.5 Definition of 'Payment Instrument' (Article 4(23)) 12
3.2.2.6 Definition of 'Durable Medium' (Article 4(25)) 12

3.2.3 PSD: Title II – Payment service providers 12

3.2.3.1 Waiver of ongoing capital requirements for subsidiaries (Article 7(3), Q1) 12
3.2.3.2 Method used for the calculation of ongoing capital (Article 8, Q2-3) 13
3.2.3.3 Safeguarding of funds (Article 9, Q4-9) 13
3.2.3.4 Activities – Ancillary services (Article 16(1)(a), 16(3) and Recital 13) 15
3.2.3.5 Activities – Separation of funds held for payments from funds used for credit-granting (Article 16(3)(c)) . 16
3.2.3.6 Activities – Holding of payment accounts (Article 16(2) and (4)) 16
3.2.3.7 Agents (Article 17) 19
3.2.3.8 Recordkeeping (Article 19) 20
3.2.3.9 Derogation from authorisation/supervision requirements for small payment service providers (Article 26, Q10-14) 20
3.2.3.10 Access to payment systems (Article 28) 20

3.2.4 PSD: Title III – Transparency of conditions and information requirements for payment services 21

3.2.4.1 Consumer protection and micro enterprises (Articles 30(2) and 51(3), Q15-16) 21
3.2.4.2 Burden of proof on information requirements (Article 33, Q17) 22
3.2.4.3 ..Derogation from information requirements for low-value payment instruments and electronic money (Article 34(2), Q18-19) 22
3.2.4.4 Information provided prior to contract (Article 41) 23
3.2.4.5 Information on maximum execution time and point of receipt of payment order (Article 42(2)(d) and (e)) . 23
3.2.4.6 Accessibility of information and framework contract (Article 43) 23
3.2.4.7 Changes in conditions of the framework contract (Article 44) 23
3.2.4.8 Changes in interest or exchange rates to be calculated in a neutral and non-discriminatory manner (Article 44(3)) 24
3.2.4.9 Termination of framework contracts (Article 45, Q20-22) 24
3.2.4.10 Information for the payer/payee on individual payment transactions (Articles 47 and 48, Q23-28) 25

3.2.5 PSD: Title IV – Rights and obligations in relation to the provision and use of payment services 25

3.2.5.1 Information on surcharging (Article 50(1)) 25
3.2.5.2 Out-of-court redress procedure for enterprises and organisations (Article 51(2), Q29) 26
3.2.5.3 Consumer protection and micro enterprises (Article 51(3)) 26
3.2.5.4 Charges applicable (Article 52) 26
3.2.5.5 Payment of charges applicable (Article 52(3), Q30-32) 27
3.2.5.6 Derogation from certain rules for low value payment instruments and electronic money (Article 53, Q33-35) 28
3.2.5.7 Notification of unauthorised or incorrectly executed payment transactions (Article 58) 28
3.2.5.8 Evidence of authentication and execution of payment transactions (Article 59) 29
3.2.5.9 Payment service provider's liability for unauthorised payment transactions (Article 60) 29

3.2.5.10 Payer's liability for unauthorised payment transactions (Article 61, Q36-37) ... 30
3.2.5.11 Refunds for payment transactions initiated by or through a payee (Articles 62 and 63) ... 30
3.2.5.12 Point in time of receipt of funds (Article 64) ... 31
3.2.5.13 Refusal of payment orders (Article 65(2)) ... 31
3.2.5.14 Irrevocability (Article 66) ... 31
3.2.5.15 Execution times, value dating, and liability for non-execution or defective execution (Article 69 (and 64, 73, 74, 75 and 77)) ... 32
3.2.5.16 Cash placed on an account (Article 71) ... 34
3.2.5.17 Shorter execution times for national transactions (Article 72, Q38-42) ... 34
3.2.5.18 Value date and availability of funds (Article 73(1)) ... 35
3.2.5.19 Data Protection (Article 79) ... 35
3.2.5.20 Enforcement and redress (Articles 20, 21 and 80-83, Q 46) ... 36

3.2.6 PSD: Titles V and VI – Final provisions ... 36

3.2.6.1 Transitional provisions (Article 88, Q43-45) ... 36
3.2.6.2 Relationship of the PSD with anti-money laundering / terrorism financing legislation (Articles 88(4) and 91) ... 37

3.2.7 PSD: Annex ... 37

3.2.7.1 Acquiring of payment instruments (Point 5) ... 37

3.2.8 Choice of legal instrument (Q47) ... 38

3.3. OTHER ISSUES RELEVANT TO THE IMPLEMENTATION OF THE PSD ... 38

3.3.1 The repositioning of cash and cheques (Q48-51) ... 38

3.3.2 Cheques and other payment instruments (Q52-55) ... 39

3.3.3 SEPA (Q56-57) ... 40

3.3.3.1 SEPA Direct Debit Mandate migration ... 40
3.3.3.2 Facilitating SEPA implementation ... 40

3.3.4 Value added services ... 41

3.3.4.1 E-invoicing and e-reconciliation (Q58-60) ... 41
3.3.4.2 E-commerce (Q61-62) ... 42
3.3.4.3 M-payments (63-64) ... 42

3.3.5 Special treatment and conditions for non-resident account-holders (Q65-68) ... 43

3.4. CONCLUDING REMARKS (Q69-73) ... 43

4. WHAT HAPPENS NEXT ... 43

1. EXECUTIVE SUMMARY

- The consultation on retail payment services policy and the Payment Services Directive[1] (PSD) has been successful. Eleven responses were received from a wide variety of stakeholders both from Malta and from other EU countries. Many of these were coordinated responses by organisations or associations on behalf of their members. Further views were expressed by stakeholders orally during information sessions, seminars and bilateral or multilateral meetings held at, or attended by, the Central Bank of Malta.[2]

- Various domestic respondents indicated their broad support for the approach proposed by the Central Bank of Malta, as set out in the Consultative Paper, in respect of the repositioning of cash and cheques and the regulatory framework applicable to cheques and other payment instruments. Throughout the consultative period, the Central Bank of Malta received positive and enthusiastic feedback from the public sector, credit institutions, financial institutions, the business community, constituted bodies and consumers. As such, generally speaking, it appears that a broad national consensus exists in respect of the issues identified by the Bank in its Consultative Paper, as well as in respect of its vision for the future development of its retail payment services policy.

- A large number of domestic and international stakeholders engaged actively in, and dedicated significant resources to, this consultation process. It is clear that many entities recognised the importance of the process and understood that its outcome will considerably change the payment services market landscape in Malta.

- Respondents indicated strong support for a harmonised implementation of the PSD, and encouraged regulators to work towards harmonised implementation across the EU in order to avoid inconsistencies.

- The Bank received various highly-detailed responses which have provided both a high quantity and quality of feedback, comment and intelligence. This information will be very useful to domestic regulators in elaborating retail payment services policy, and will allow for much higher quality transposition measures than would have otherwise been possible.

- Various concrete initiatives to promote value added services have been submitted. Yet, it is clear that regulatory review and robust market/regulator coordination will be needed to deliver many of the strongest potential advantages of SEPA and the PSD.

- Stakeholders broadly share the Bank's view that developments are such that the present traditional methods of processing and executing retail customer's payments need to be changed. In particular, along with the Central Bank, stakeholders hope to see SEPA become a success leading to substantial development in e-payment, m-payment, e-invoicing, and e-reconciliation.

---

[1] Council Directive (EC) 2007/64 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, at: {http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:0036:EN:PDF}.

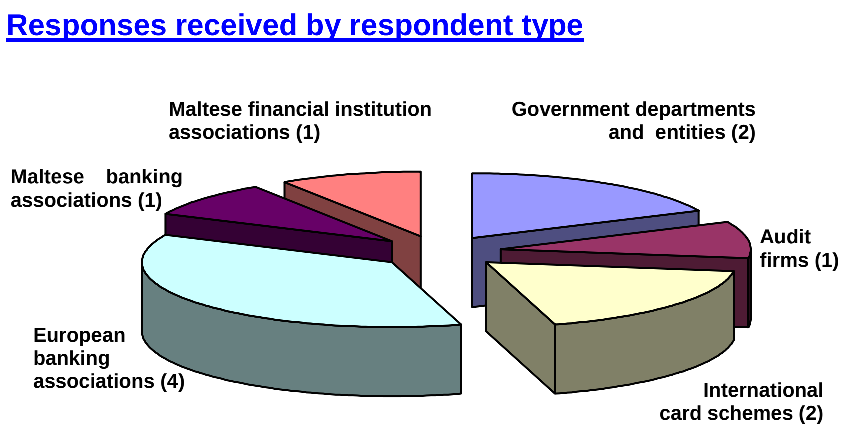
[2] The terms 'Central Bank of Malta', 'Central Bank' and 'the Bank' are used interchangeably within this document, save as indicated otherwise by the context.

2. INTRODUCTION

The Central Bank of Malta published a 'Consultative Paper on Retail Payment Services Policy and the Payment Services Directive'[3] on 28 January 2008 following pre-consultation with other authorities, including the MFSA and the OFC.

The Consultative Paper was sent to 216 potentially interested parties identified by the Bank and was publicised on the Bank's website as well as by means of press releases and articles published in the domestic press. The consultation process was originally to last nine weeks, until 31 March 2008. However, following the receipt of various requests for an extension of that period, the Bank decided to extend the deadline by a further month until 30 April 2008.

The consultation on retail payment services policy and the PSD has been successful. Eleven written responses were received from a variety of stakeholders, both from Malta and from other EU countries, though, as the Bank actively encouraged various stakeholders to submit coordinated responses through the constituted bodies or associations which represent them, it is clear that the number of organisations involved in the elaboration of these responses was significantly larger than the number of responses.



A minority of respondents answered all the questions asked, with the majority focusing on those questions of particular interest to their line of activity. However, a majority of respondents also went beyond the questions posed directly and expressed other views or concerns, often submitting separate detailed documents addressing issues they perceived to be of particular relevance.

The Bank also had the opportunity to engage with a wide variety of interested parties, and received a large amount of constructive comment and feedback during information sessions, seminars and bilateral or multilateral meetings organised or addressed by members of its staff and its senior officials.

During the consultation period, the Bank (along with the MFSA) also attended meetings of the PSDTG set up by DG Internal Market of the European Commission, along with the regulators from all other EU member states (plus Norway) responsible for the transposition of the PSD within their respective national context and the ECB. The PSDTG seeks to come to a common interpretation of the various provisions of the PSD, in particular those lacking clarity or open to a certain degree of interpretation, in order to ensure its harmonised transposition into national law.

---

[3] Central Bank of Malta, *Consultative Paper on Retail Payment Services Policy and the Payment Services Directive*, 28 January 2008, available at: {http://www.centralbankmalta.org/updates/Downloads/pdfs/payment_serv_cons_paper_2008.pdf}.

Events organised or addressed by the Central Bank of Malta

Title	Organised by	Type of event	Date
Making the Single Euro Payments Area (SEPA) a Reality in Malta: A National Conference to launch SEPA in Malta	– *Central Bank of Malta* – *Malta Chamber of Commerce and Enterprise (CoCE)* – *Malta Bankers Association (MBA)*	National Conference	*26-Oct-07*
Integration of Maltese financial services in the Single Euro Payments Area (SEPA)	– *Institute of Financial Services, Malta (IFS)* – *Malta Financial Services Authority (MFSA)*	Workshops	*Oct, Nov-07*
BOV/MHRA Q4 – 2007 Hotel Survey Presentation	– *Malta Hotels and Restaurants Association (MHRA)*	Business Breakfast	*14-Mar-08*
Information session on the PSD and SEPA for financial controllers	– *Malta Hotels and Restaurants Association (MHRA)*	Information session	*26-Mar-08*
Unlocking the Challenges and Opportunities offered by the Single Euro Payments Area and the Payment Services Directive	– *Malta Business Weekly* – *Bank of Valletta plc.* – *Central Bank of Malta*	Business Breakfast	*06-Jun-08*
The Single Euro Payments Area Project & the Payment Services Directive: An Awareness Programme on the Single Euro Payments Area Project and the Payments Services Directive	– *Institute of Financial Services, Malta (IFS)* – *Malta Financial Services Authority (MFSA)* – *Central Bank of Malta*	Awareness Programme	*6 sessions (3 hours) over May/Jun-08*
Sessions with officials and/or members of the: – Malta Business Bureau (MBB) – Association of Licensed Financial Institutions (ALFI) – Malta Chamber of Commerce and Enterprise (CoCE) – Malta Hotels and Restaurants Association (MHRA) – Malta Federation of Industry (FOI)	– *Central Bank of Malta*	Bilateral or multilateral information sessions following requests by these organisations	*Various*

The Bank took advantage of intelligence collected throughout the consultation process in order to bring to the attention of the PSDTG various transposition or implementation issues identified in the domestic context, and was able to obtain common clarifications and/or common interpretations in respect of these whilst ensuring that common clarifications and/or common interpretations agreed to in relation to issues brought to the attention of the group by other regulators provided adequately for Maltese regulatory and market realities. The outcome of this process should allow for national transposition measures which provide a higher degree of clarity than may be found within the PSD, whilst ensuring that these measures are compliant with the interpretative views of the Commission and other member states. This should lead to both increased legal and market certainty, less national variance in implementation, and less likelihood of infringement proceedings due to differences in interpretation between the European Commission and domestic regulators.

3. RESPONSES

3.1. Reactions to the Central Bank of Malta's vision

Various respondents acknowledged and, often enthusiastically, shared the views and the vision of the Bank, especially insofar as the repositioning of cash and cheques and the use of more efficient and secure payment instruments are concerned.

One public sector respondent noted that a project is currently underway between the Bank and the Ministry of Finance, the Economy and Investment that should pave the way for the introduction of SEPA instruments across all Government departments.

3.2. Transposition of the Payment Services Directive

3.2.1 General

3.2.1.1 Use of national discretion

While the PSD is a maximum harmonisation Directive, many provisions give member states discretion in implementation. One respondent felt that the use of such discretion may raise a number of interpretation issues. In the light of the Directive's aim of harmonising the regulatory regime for payment services across the EU, and especially in connection with SEPA, this respondent strongly supported a harmonised implementation across the EU in order to avoid inconsistencies. Various other respondents noted that they would prefer the least possible use of national discretion, save when there are patent good reasons.

3.2.1.2 Transposition date

The Maltese legislature is bound to finalise the transposition of the PSD into domestic legislation by 1 November 2009. However, it may also elect to do so earlier. Within this context, respondents made the following remarks:

- PSPs that are already operating on a pan-European basis will need to conduct a thorough review and implement systems, process and documentation changes across the whole of their operations in order to ensure compliance with the PSD. In order to facilitate an orderly transition to a post-PSD world, it is crucial that pan-European players have sufficient time to make these changes and are able to roll out the changes with a single implementation date in mind for the whole of Europe, namely 1 November 2009.

- If some countries introduce the PSD in advance of the transposition deadline, there is a risk of having a non-harmonised framework in the short term. This would create operational and legal difficulties for the SEPA schemes, as there would not be a level playing field within the group of SEPA countries at least for some months.

- A single implementation date would allow increased transposition benefits from a coordinated interpretation of the Directive (where required), rather than having early, possibly incomplete interpretations, in conflict with later transpositions;

- The small size of the market in Malta allows for agility. Early adoption (though not necessarily early entry into force) should be encouraged, along with innovative moves to make Malta more attractive for international investment (the respondent gave the example of “the UK's bold step” to introduce real-time transfers between accounts at different local banks by mid-2008).

3.2.1.3 Retroactive application of PSD

One respondent felt that implementing legislation should clarify that the PSD does not apply to PSU relationships or payment transactions commenced prior to the effective date of the legislation. The respondent gave a number of examples of potential problems that could occur otherwise. In particular:

- Article 57(1)(c) provides that a PSP must be able to produce evidence of notification, for a period of 18 months from the date of notification by a PSU to the PSP, of loss or theft of a payment instrument. Retroactive application of this article would be unworkable, and it must thus be applicable expressly only to notifications first made under Article 56 after 1 November 2009.

- The Article 58 13-month notification period must be applied expressly only to transactions initiated after 1 November 2009, as reviving notification periods for transactions initiated earlier would cause an unmanageable situation for PSPs.

- To the extent micro-enterprises are treated differently from larger commercial customers, it would be disproportionately burdensome to require PSPs with thousands of commercial customers to review their entire customer base as of 1 November 2009 in order to verify which pre-existing customers were large and which were micro-enterprises and therefore subject to different requirements. Effectively, requirements for micro-enterprises should be applied only to newly acquired micro-enterprise customers or existing customers whose contracts are concluded anew after 1 November 2009.

3.2.1.4 ‘One leg in’ transactions

The PSD applies to ‘two leg in’ transactions (i.e. where both the payer and payee’s PSPs are within the EU). However, it is possible for the national legislator to extend the application of the so called ‘conduct of business’ rules found in Titles III and IV of the Directive also to ‘one leg in’ transactions (i.e. those transactions where a payee’s PSP is in the EU whilst the payer’s PSP is outside the EU, or vice-versa).

One respondent felt that the application of Titles III and IV to ‘one leg in’ transactions is not permitted by the plain language of the Directive, as Article 2 of the said Directive provides that “Titles III and IV shall apply *only* where both the payer’s payment service provider and the payee’s payment service provider […] are located in the Community”. A second respondent also did not support the extension of the PSD to transactions outside member states.

The first respondent further submitted that, even if this were permitted, any consideration of this option should take into account a detailed analysis of the impact of a ‘one leg in’ application of Titles III and IV on all types of payment transactions to be carried out after the impact of the existing ‘two legs in’ principle can be fully studied and appreciated, and that any such analysis carried out at this stage would be premature. The respondent held that if member states wished to consider the option of applying ‘conduct of business’ rules to ‘one leg in’ transactions, they should consider in great detail, and in respect of each type of payment, the potential unintended consequences thereof, and tailor any such regulation accordingly, in full consultation with stakeholders, once the impact of the Directive has been fully evaluated and understood.

Furthermore, the same respondent felt that application of Titles III and IV to ‘one leg in’ transactions would have negative, unintended consequences. While PSPs both in and outside the EU favoured as much uniformity in their practices (systems, platforms, processes) as was commercially feasible, the respondent maintained that this uniformity could not be achieved by simplistically imposing the same prescriptive rules to ‘one leg in’ transactions as are applied to ‘two legs in’ transactions. This because EU rules, and their knock-on effects, will often conflict with the rules and practices in the country where the other leg is located. By way of example, the respondent considered Article 58, which provides payment service users 13 months to dispute a payment transaction. In most countries outside the EU, the time period within which a cardholder is allowed to raise disputes regarding card transactions is less than 13 months – e.g. 6 months. If the provisions of Article 58 were to be applied to ‘one leg in’ transactions, then an EU cardholder would be able to raise a dispute about a transaction with a non-EU merchant at, say, 12 months after the transaction date, whilst the merchant would no longer have the records required to allow the cardholder’s PSP to evaluate the dispute. This would put PSPs and international payment systems in an unworkable situation.

The respondent further submitted that where it was feasible to apply PSD rules to ‘one leg in’ transactions, PSPs would probably opt to do so voluntarily as, generally speaking, they sought to operate on the basis of common processes.

3.2.1.5 Provision of payment services to government

One respondent noted that, whilst the Central Bank of Malta may for the foreseeable future remain the main service provider to Government, legislation should allow for flexibility and foster competition. Within this context, the respondent seemed to suggest that: (i) a level playing field should exist, with the Central Bank of Malta being fully subject to the PSD; (ii) the Government should continue to be able to acquire payment services from PSPs other than the Central Bank of Malta; and (iii) the Central Bank should act as a regulator when it is not competing with other banks to provide any particular service.

3.2.2 PSD: Title I – Subject-matter, scope and definitions

3.2.2.1 Negative scope (Article 3)

Two respondents noted difficulty in interpreting the Article 3(k) text “services based on instruments that can be used to acquire goods or services only in the premises used by the issuer or under a commercial agreement with the issuer either *within a limited network of service providers or for a limited range of goods or services*”, and felt that further clarification was required, particularly in determining the border-line between a network that was limited and one that was not. For instance, while a petrol card qualifies for the exemption, the question arises whether it remains exempted when it can additionally be used for purchasing goods other than fuel sold at petrol stations, or even goods from nearby shops (not necessarily run by the petrol stations themselves). It was felt that the absence of a clear definition of limited networks would generate confusion and would be an obstacle to a level-playing field.

In the context of Article 3(j) and 3(o), one respondent felt that clarification was required in respect of mobile top-up services provided through an ATM. It was argued that Article 3(j) makes clear that services provided by technical and infrastructure facilitators, such as IT and communication, data processing, storage and authentication networks, all of which support the provision of payment services but are effectively invisible to the end-user, are outside the scope of the PSD, as is the case with cash withdrawal services provided by ATM providers who are not a party to the framework contract between the customer withdrawing the money and the institution providing it, which are specifically excluded from the scope of the PSD by Article 3(o). The respondent believed that mobile top-up services provided through an ATM should therefore also be excluded from the scope of the PSD, because the ATM owner would purely be providing mobile phone voice service providers with an additional channel through which they can sell airtime to mobile phone users.

3.2.2.2 Definition of 'Consumer' (Article 4(11))

A respondent felt that the definition of a 'consumer' in Article 4(11) – someone acting for purposes "other than his trade, business or profession" – should be clarified in the transposing legislation so as to make it explicit that 'consumer' excludes an employee of a company to whom a payment instrument is issued, or a payment service provided, under arrangement with the employer for the purpose of carrying out the employer's business.

3.2.2.3 Definition of 'Payment Account' (Article 4(14))

It was noted by two respondents that 'payment account' in Article 4 (14) is a generic term that is to apply to both payment accounts held by payment institutions and current accounts held by credit institutions. Article 16(2) provides that payment institutions may only hold payment accounts used exclusively for payment transactions, while credit institutions can hold payment accounts that allow functionality beyond purely payment services. However, credit institutions generally offer many types of accounts, including those where the main purpose is not that of executing payment transactions (e.g. accounts for saving money or providing credit facilities). As even these accounts are subject to occasional transactions involving the movement of funds in and out of them, these respondents felt that it would be unreasonable to apply the requirements of Title III and IV to a) accounts where one of the main purposes is not the execution of payment transactions and b) transactions to and from such accounts – for example by expecting monthly statements for savings or mortgage accounts (Article 48(2)) or a day's notice for closing a with-notice savings account.

3.2.2.4 Definition of 'Agent' (Article 4(22))

One respondent cautioned that if the definition of 'agent' in Article 4(22) were to be broadly interpreted, the phrase "acts on behalf of a payment institution in providing payment services" could capture pure outsourcing arrangements where, for example, a company is engaged by a PI to print and send transaction statements to the PI's customers based on information produced by the PI's systems. Such a broad interpretation would impose a requirement that all customers be notified of every possible back office outsourcing arrangement and outsourcing partner. It would also put extra burden on the PI's competent authority, who may be required to keep a register of every agent.

As the respondent felt that this was certainly not the intent of the PSD, the term "agent" should be given its traditional meaning as "one who is authorised to represent and bind the principal in legal and contractual matters vis-à-vis third parties". Similarly, the term "payment service", when used in the context of defining "agent", should be understood to mean only those elements of payment services that are core to effecting the payment itself – i.e. elements that involve the movement of customers' funds.

In order to ensure a narrow interpretation of this definition, as is supported by the wording of Article 3(c) and Article 17(1), and so as to avoid unintended consequences, the respondent suggested adding the phrase "represents and acts" to the definition.

3.2.2.5 Definition of 'Payment Instrument' (Article 4(23))

Article 4(23) defines 'payment instrument': "Payment instrument means any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order." Within this context, one respondent noted that the above wording suggested that every means of initiating a payment order could be captured by the definition of payment instrument.

However, the respondent felt that the above definition should be read in conjunction with definition 19 ("Authentication"), which refers to instruments based on personalised security features. In this light, it is important for member states to recognise, through the transposition text, the differences in rights, obligations and liabilities arising from payment services using personalised security features (e.g. a payment card with PIN) and those not using them (e.g. a direct debit or a paper-initiated credit transfer). In this respect, Articles 56, 57 and 61 should be interpreted as involving payment instruments that also have the characteristic of personalised security features. By derogation from Article 60, the liability regime in article 61 should be limited to payment instruments with personalised security features.

3.2.2.6 Definition of 'Durable Medium' (Article 4(25))

Two respondents found it very important that the term 'durable medium' should be understood to include not only paper but also durable electronic media, such as 'pdf'-format documents available online for retrieval and downloading by users. The requirement that information be "addressed to" the user should be understood to include any durable electronic document made available to the user via a secure online account accessible only to him (potentially also accompanied by email alert to the user regarding the delivery or addition of such document to the secure online account) or email directed to the user with a link enabling the user to access and download the relevant document from the provider's website. In any event, the respondents felt that the interpretation should be flexible enough to promote a transition from paper-based processes to more efficient electronic-based processes that facilitate the development of the EU as a technology-driven, knowledge-based economy in keeping with the goals of the Lisbon Agenda, whilst also ensuring that customers have ready access to durable, fixed records of their payment transactions and framework contract. At the very least it should be made explicit that 'durable medium' may include paper, but does not need to be limited to paper.

3.2.3 PSD: Title II – Payment service providers

3.2.3.1 Waiver of ongoing capital requirements for subsidiaries (Article 7(3), Q1)

The Maltese legislator may choose to exclude subsidiary companies licensed as payment institutions but included in the consolidated supervision of a parent credit institution and fulfilling certain conditions, from ongoing capital requirements otherwise applicable to payment institutions. One respondent felt that all payment institutions should meet the capital requirements prescribed in Article 8, and that the option in Article 7(3) should not be availed of. This in order to ensure a level playing field between payment institutions and better security for customers.

However, another respondent felt that the intended consequence of Article 7(3) was indeed to promote a level playing field between stand-alone PIs and those which may be part of a banking group. Nevertheless, it was also felt that it would be consistent with the level playing field principle that PIs which are part of a banking group should equally have the opportunity to benefit from the specific capital regime as defined under Title II, and that thus these types of PIs should have an alternative to being included under a prudential supervision regime on a consolidated basis under Directive 2006/48/EC.

3.2.3.2 Method used for the calculation of ongoing capital (Article 8, Q2-3)

While one respondent felt that methods A and B are more straightforward and easier to determine, another two respondents submitted that a PI should be allowed the discretion to determine which of the three methods for calculating ongoing capital requirements should be applied to it, subject to competent authority approval on a case-by-case basis. These respondents felt that, for example, method C seemed best suited to credit and charge card issuers, as it focuses on the interest and fee income that characterises a credit and charge card business. On the other hand, Method A seems least relevant to such a business and might risk unfairly treating some payment types which have higher operating costs (e.g. maintaining a sophisticated systems-based credit and charge card business versus a point-to-point money transfer business) but pose lower risk to customers and in particular to customers' funds (e.g. involving no receipt of customer funds as a condition for effecting payment, which is the case in a credit and charge card business but not in a money transfer business). One of these respondents also felt that the +/-20% factor should be used to increase capital requirements where a 'non-mixed business' payment institution does not ring-fence or safeguard funds held on payment account.

Another respondent recommended that, when the choice of method is made, account is taken of the need to ensure a level playing field between all PSPs, keeping in mind own-fund requirements for credit institutions.

3.2.3.3 Safeguarding of funds (Article 9, Q4-9)

Article 9 requires the legislator to provide for a regime causing PSPs to safeguard funds received from payment users from commingling with other funds. This may be done either by requiring operational separation (separate accounts) plus legal insulation against the claims of other creditors (ring-fencing), or by requiring the PSP to hold an insurance policy or guarantee that covers such funds payable in the case of insolvency.

One respondent noted that the second option appeared to be both the easiest to operate and the safest for clients, and that safeguarding would ideally be in the form of an unconditional bank guarantee (based on volumes +20%) payable on demand. In any case, this respondent felt that, in deciding which method was to be chosen, account should be taken of the need to ensure a level playing field between all PSPs, therefore keeping in mind fund safeguarding requirements for credit institutions.

In the context of card payments, another respondent noted that it is usually the case that a cardholder's account is in debit balance, not in credit balance. Nevertheless credit balances do occasionally arise, for example where a cardholder overpays his card balance, where a cardholder obtains a refund of amounts charged in a previous month, or where a cardholder prepays his card account in anticipation of a significant upcoming purchase on his card. Though Article 9 allows two methods by which these credit balances can be protected from insolvency of the card issuer, this respondent noted that, for a pan-European payment business, the ring-fencing method outlined in sub-paragraphs (a) and (b) was unworkable so long as the account in which the credit balances are deposited is required to be made insolvency-proof. In particular, this respondent doubted the feasibility of insolvency-proofing accounts throughout several jurisdictions in the EU, some of which are civil law jurisdictions that do not recognise the concept of 'trust' as is commonly used for ring-fencing in common law jurisdictions. This respondent therefore believed that obtaining a third party insurance policy or bank guarantee should be preferred. Nevertheless, given the uncertainties involved with either method, and in view of the fact that both methods are permitted under the PSD, this respondent believed that PIs should be given discretion to choose which method best suited their business, applying a risk-based approach.

Also in the context of card payments, this respondent noted that merchant acquiring does not involve the receipt of customer (cardholder) funds for onward payment to merchants and, as such, that the amounts owed by merchant acquirers to merchants would not be subject to safeguarding. It is argued that card payments are 'pull' transactions, initiated through the payee (merchant), in which amounts are paid by acquirers to merchants before they are received by issuers from cardholders. Although an acquirer may receive payment from the issuer before paying a merchant, this typically occurs before the issuer has received payment from the cardholder and cannot, therefore, constitute customer funds. Therefore, to avoid any doubt, this respondent would encourage the Maltese legislator to clarify expressly that amounts owed to merchants in the context of a merchant acquiring service do not constitute funds subject to safeguarding.

Finally, the same respondent noted that full legal separation is not required and may inhibit small players in other lines of business from entering the payment services space. With respect to Article 16(3)(c), which requires some form of separation of funds held on a payment account from funds used to extend credit, this respondent feels that it is unclear what kind of separation is required, but would suggest clarification to the effect that the form of separation should reflect the approach taken by a payment institution to safeguarding under Article 9. In other words, if ring-fencing is chosen, then physical separation is required, while if coverage with an insurance policy or bank guarantee is chosen, then accounting separation is required (as the insurance policy or guarantee is sufficient to protect the interests indicated by Article 16(3)(c)).

Like the second respondent, a third respondent believed that the PI itself should be able to determine the safeguarding method it should apply in order to take into account the type, size and position of its business.

However, two respondents believed the method for safeguarding should be chosen by the legislator prescriptively, as this would allow for a greater degree of legal certainty. Furthermore, contrary to the views of the first two respondents, one of these respondents makes a strong recommendation that the first option (ring-fencing) should be adopted, arguing that such an arrangement would be more transparent and alone would provide for a sufficient audit trail. The same respondent also felt that anything short of an arrangement based on a safeguarding regime chosen by the legislator would give rise to the creation of various arrangements and complex contracts between PIs and users over which the competent authority would undoubtedly exercise a lesser degree of control. The respondent also felt that the legislator should provide for safeguarding even when the PI carries out payment business only (i.e. even when it is not a hybrid PI).

Two other respondents agreed that it would seem to be a logical extension of the level playing field principle for member states to apply the safeguarding requirements of Article 9(1) even to non-hybrid PIs. However, one respondent disagreed and submitted that safeguarding provisions need not apply to payment institutions that engage only in payment services to the exclusion of any other lines of business that may be permitted under Article 16(1)(c). A number of reasons were advanced: (i) the Directive contains adequate capital requirements; (ii) PIs will be supervised by the competent authority on an ongoing basis; and (iii) the management of a 'single business' payment institution will necessarily focus solely on the soundness of its only line of business. This respondent noted that an alternative approach is available to the competent authority – to increase the level of own funds for 'single business' payment institutions by 20% under Article 8(3).

Two respondents felt that legislation should cater for the safeguarding of all amounts, immaterial of size, and that even small amounts of funds need to be safeguarded, as they usually belong to individuals or small and medium sized enterprises.

On the other hand, one other respondent took the opposite view, noting that the exclusion of amounts of €600 or below from safeguarding would capture many of the credit balances on card accounts which tend to be small in amount and to arise inadvertently. Excluding these small amounts could, this respondent argued, lead to significant cost savings. In addition the same respondent pointed out that a compromise position might be to apply Article 9(4) only in cases where the funds do not attract interest (and where customers consequently have no incentive to keep even small amounts of funds with payment institutions).

3.2.3.4 Activities – Ancillary services (Article 16(1)(a), 16(3) and Recital 13)

One respondent noted that Article 16(1)(a) allows PIs to provide ‘operational and closely related ancillary services such as […] foreign exchange services’. The question therefore arises whether, if a PI already provides foreign exchange services in the course of executing payment transactions, it may also provide foreign exchange services on a standalone basis, e.g. cash-for-cash exchanges. The respondent believed that this interpretation was warranted as many of the operational and risk management processes would be the same or similar, and the provision of foreign exchange services on a standalone basis merely represents an extension of activities already conducted by a PI.

Similarly, the respondent pointed out, a PI offering card products may provide travel services to cardholders as a card benefit. The PI should be permitted to extend these services to other parties. It should also be permitted to leverage its own card payment processing operations to offer standalone processing services to other PSPs. Both the travel and processing functions constitute ‘operational and closely related ancillary services’. As these activities would therefore fall within the scope of Article 16(1)(a), as opposed to 16(1)(c), clarification is needed that they may be conducted by a PI in or into other member states as part of its ‘passporting’ of core payment services in respect of which these additional activities are deemed ‘operational and closely related’.

Another respondent, for the sake of maintaining a level playing field, urged regulators to maintain consistency across member states in the application of Article 16(3)(a), whereby credit offered through PIs shall be ancillary, and granted exclusively in connection with the execution of a payment transaction.

In this context, the first respondent noted that, in a market where credit cards that allow the cardholder to revolve balances beyond the 12-month limit established in Article 16(3)(b) play a significant role, such as the UK and some other EU markets where non-bank financial institutions already contribute to competition in the area of credit cards, it is critical that non-bank PIs continue to be able to compete with banks to issue credit cards domestically. The ability to do this is established both under Article 16(3)(b) itself, which applies the 12-month limitation in the context of ‘passporting’, and Article 16(1)(c), which allows for ‘mixed business’ PIs. This respondent strongly supports the inclusion in the implementing legislation of a provision explicitly permitting a locally established PI to offer credit and issue credit cards in the home state beyond 12 months.

Similarly, in the event that a PI ‘passports’ the issuing of charge cards (i.e. cards requiring repayment of the balance in full each month, sometimes also called ‘deferred debit cards’, which already fall squarely within the scope of ‘passporting’ under Article 16(3)(b)), the implementing legislation should also clarify that the PI is able simultaneously to ‘passport’ credit facilities that are linked to charge cards and enable charge card holders, at their option before the due date for each monthly billing cycle, to revolve their card balances (or any portion thereof or individual transactions therefrom) or to pay these off in instalments over a period of 12 months from the transaction date. Because these credit facilities meet the criteria of being ‘ancillary and granted exclusively in connection with the execution of a payment transaction' under Article 16(3)(a), and fall within the 12-month limitation in Article 16(3)(c), they should be deemed 'passportable'.

3.2.3.5 Activities – Separation of funds held for payments from funds used for credit-granting (Article 16(3)(c))

A respondent noted that Article 16(3)(c) required interpretation in view of Article 9 safeguarding requirements, which allow the choice of safeguarding funds held for payment either through (i) ring-fencing in a separate account or (ii) covering with an insurance policy or bank guarantee. Article 16(3)(c) also requires some form of separation of funds held on a payment account from funds used to extend credit, but it is unclear what kind of separation is required. The respondent felt that a sensible interpretation is that the form of separation should reflect the approach taken by a PI to safeguarding under Article 9. In other words, if ring-fencing is chosen, then physical separation is required, but if coverage with an insurance policy or bank guarantee is chosen, then accounting separation is required (as the insurance policy or guarantee is sufficient to protect the interests indicated by Article 16(3)(c)).

3.2.3.6 Activities – Holding of payment accounts (Article 16(2) and (4))

Article 16(2) defines a specific regime for payment accounts held by PIs, providing that PIs may only hold payment accounts that are used exclusively for payment transactions. Article 16(4) also specifies that PIs shall not conduct the business of taking deposits or other repayable funds within the meaning of Article 5 of Directive 2006/48/EC[4].

One respondent found it logical that these provisions should cause national legislators to prescribe that interest should not be paid on funds held in payment accounts with PIs. Furthermore, the funds in such accounts should only be held for the time necessary to make the instructed payment transactions. Finally, if funds were to remain on the payment account without being unambiguously associated with payment transactions, then the account would no longer be used exclusively for payment transactions but also for deposit purposes. This respondent, therefore, urged national legislators to draw a clear distinction between credit institutions' deposit taking and PIs' payment service activities.

Two other respondents, however, took a rather different view of the matter.

The first of these noted that there are compelling legal and public policy reasons for concluding that the handling of credit balances on payment accounts by PIs does not constitute the business of taking deposits or other repayable funds for purposes of article 16 (4) PSD.

Solely in the context of card payments, for example, there are a number of circumstances in which payments giving rise to credit balances on card accounts may in fact occur:

a. as a result of an error by the cardholder, where, on occasion, cardholders simply pay too much or make duplicate payments by mistake;

b. as a result of an intentional overpayment by the cardholder in order to 'round up' an odd amount;

[4] Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ (2006) L177/1.

c. as a result of an intentional overpayment by the cardholder in order to ‘cover’ exceptional spending which may be in excess of a credit limit (in the case of a credit card account) or so far outside the normal pattern of spending as to be likely to be refused (in the case of a charge card[5]), or where a cardholder expects to be away from home at a billing date and makes a payment in advance so as to avoid a default occurring once the monthly statement is issued;

d. as a result of a refund to the cardholder account, for example where goods are returned to the merchant;

e. by arrangement with the card issuer, where the individual cardholder’s circumstances are such as to cause the card issuer to require security against future expenditure.

The respondent undertook a detailed legal analysis of the notion of deposit, noting that – in general – a deposit is a contract pursuant to which a person entrusts goods or valuables to a third party, and the latter undertakes an obligation in relation to the custody and safe keeping of the deposited items and in relation to returning them upon request or notice of the depositor or at a fixed future time. In the banking and financial world, deposit taking is basically the activity of placing money in the custody of a credit institution/bank, for safety or convenience, to be withdrawn at the will of the depositor or under rules and regulations agreed upon. The taking of deposits and other repayable funds from the public is, in fact, the main source of funding for credit institutions and banks. It is with the relevant amounts that credit institutions and banks will operate their investments and extend credit to the public.

Within this context, the respondent pointed out, UK law specifies explicitly that accepting funds from the public constitutes a deposit only if (i) money received by way of deposit is subsequently lent to others, or (ii) any other activity of the person accepting the deposit is financed wholly, or to a material extent, out of the capital of, or interest on, money received by way of deposit.

Furthermore, at UK law, and in particular in paragraphs (a) and (b) of article 5(2) of the Financial Services and Markets Act 2000 (Carry on Regulated Activities) Order 2001(“RAO”)), a deposit must be paid/received on terms under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it. Within this context, the respondent noted that the fact that advance payments or overpayments on a payment account are, as a matter of practice, repaid if requested does not in itself necessarily give rise to a contractual term to that effect, and that it does not necessarily follow from this proposition that the money in question has been paid to the institution ‘on terms’ that it would be repaid.

On the contrary, such payments, whether originated by a mistaken payment, or by intentional or unintentional overpayment, by a refund, or by arrangement to create a security advance, are inextricably connected to the provision of the payment service. Furthermore, 'services enabling cash withdrawals from a payment account' are themselves payment services, as set out in the Annex to the PSD, and therefore funds placed with a PI for this purpose would have been received ‘with a view to the provision of payment services’, and thus explicitly, with reference to Article 16(2), do not constitute a deposit. The fact that such advance payments or overpayments are related to a future payment service (i.e. overpayments towards future transactions) or to an already received payment service (i.e. refunds) is not relevant, and this appears to be the only meaning that

[5] “Charge” cards require the cardholder to pay the card account balance in full each month. “Credit” cards allow the cardholder to revolve the balance for a longer period of time.

can be given to the text of Article 16(2) that uses a term of broad significance (as 'with a view to the provision'), and without a specific time reference.

The respondent, therefore, insists that there are several legal bases for concluding that credit balances on payment accounts are not to be regarded as funds taken in the course of a deposit-taking business *if they are not used for financing the business activities of the receiving institution* and if they are not accepted 'on terms' that they are to be repaid, but must be considered to be inextricably connected to the provision of the payment service.

Apart from the legal considerations, the respondent feels that there are also compelling practical and policy considerations underlying this position. First, there is the impossibility, as a practical matter, for a card issuer, for example, to avoid accepting overpayments by cheque made through a bank. Where a cheque for an amount larger than that actually due is received, a refusal to accept the cheque would result in a detriment to the card issuer's interest to receive payment of funds advanced on behalf of the customer and, maybe most importantly, in default by the customer on the payment due - which would clearly be unacceptable to cardholders. The respondent finds that it is inevitable that excess funds will pass into a card issuer's bank account on occasion. Similarly, in relation to refunds by merchants, a simple reversal of a card transaction inevitably involving a payment to the cardholder's account is significantly easier for all parties, and less susceptible to fraud, than any other means of payment (assuming that other means are available). In both of these cases, and however the funds may subsequently be treated, it must be correct (and indeed, under Articles 60 and 63, required) for the card issuer to credit the sums to the cardholder's account because they are clearly funds which, in a general sense, 'belong' to the cardholder. The fact that the card issuer at times holds funds which 'belong' to its customers (as an inevitable but ancillary part of the provision to them of the services they require in respect of charge and credit cards) is not in itself enough to characterise its business as deposit-taking.

Furthermore, the respondent notes, from a public policy perspective, and due to the inevitability of credit balances in operating a payment service business, a decision to treat credit balances on payment accounts as deposits would be tantamount to restricting the issuance of credit and charge cards, cheque books, and other payment services strictly to banks across the whole of the EU, to the exclusion of payment institutions – ironically, the institutions explicitly created for the purpose of offering payment services.

It should also be noted that PIs are already subject to adequate own funds requirements, with discretion allowed to a competent authority as to which method to apply under Article 8, with a further possibility of varying such amount by +/-20% on the basis of risk management processes, risk loss, data base and internal control mechanisms. While own funds requirements applicable to PIs are not identical to those applicable to credit institutions, neither are the risks related to the holding of funds. In fact, while credit institutions may use deposits to fund their other business activities (e.g. lending), PIs engaged in other business activities would be subject to the safeguarding provisions of Article 9 by which competent authorities may provide that the funds cannot be used for funding other business activities, are subject to legal insulation, and, if invested, are only to be invested in secure, liquid, low-risk assets as approved by the competent authority itself. Alternatively, the competent authority may provide that the funds are to be fully covered by an insurance policy or comparable guarantee to guard against the event of insolvency of the PI.

Therefore, the respondent concludes, treating resulting credit balances as deposits or other repayable funds in the sense of Directive 2006/48/EC solely because they are not contemporaneously received with a payment order would only serve to undermine the aims of the PSD and result in increased costs, higher market entry barriers and less competition in payment service provision with no incremental benefit or protection for customers.

The second of these respondents focused on the domestic context while also making the point that advance payments or overpayments resulting in credit balances on payment accounts, which were incidental to the provision of payment services (whether or not in respect of determined or as yet undetermined payment orders), should not be considered deposits, as such consideration would:

- make the continued provision of internet-based payment facilities by PIs (as are already made available by domestic financial institutions) impossible, as the processing of internet-based payment orders requires the prior availability of funds on account;

- make it impossible for PIs to usefully provide payment services which require advance funds to be available on the customer's payment account (e.g. cheques, debit cards);

- make other payment services (e.g. credit transfers) subject to a significant additional delay as (in terms of Article 64(2)) payment orders would only be deemed to have been received once funds made available to the PI clear. Therefore, for example, in the case of a customer ordering a PI to execute a credit transfer and paying for it by cheque, the PI would only be able to execute the transaction once the cheque has been cleared (in order not to be exposed to credit risk), and the D+3/ D+1 execution time would only start to run once funds are available to the PI, resulting in a *de facto* execution time for the customer of D+8/ D+6. This would represent a significant deterioration in quality of service for customers and a competitive disadvantage for PIs as compared to credit institutions, as well as, therefore, not being compliant with the level playing field principle;

- make it impossible for users to use PIs for all their payment service requirements, as this would require customers, for example, to have their employer debit their salary to their payment account, from which they would be able to subsequently make payments, and such practice would become impossible if advance payments in respect of undetermined future payment transactions were considered deposits;

- often make the execution of payment transactions by PIs on behalf of their customers dependent on cooperation by credit institutions, their direct competitors;

- for all the reasons above, greatly reduce the ability of PIs to compete with credit institutions, perpetuating their dominance of payment service markets and running counter to the objectives of the PSD.

On the other hand, in order to ensure that credit balances are indeed advance payments in respect of payment transactions and that they will not to remain on account indefinitely, this respondent found it reasonable that such balances should be subject to a revolving time limit (say, six or twelve months), after which they would have to be returned to the customer.

In respect of the granting of interest on payment account balances, the same respondent submitted that this was not prohibited by the PSD, which is a maximum harmonisation measure, and so could not be prohibited by national law. Furthermore, any such prohibition would (i) decrease the ability of PIs to compete with banks, (ii) be detrimental to consumers, and (iii) confer no regulatory benefit or additional protection.

3.2.3.7 Agents (Article 17)

One respondent submitted that clarification was needed on (i) the ability of a PI to act as agent for another regulated entity – e.g. as an 'appointed representative' of an insurance mediation firm; and (ii) the ability of a PI to act as agent for another PI – e.g. a card issuer PI acting also as agent for Western Union.

In the latter case, clarification was required that, in respect of an agent PI's activities conducted on behalf a principal PI, the latter is liable for any failure to comply with the PSD. In particular, the agent PI should not be subject to fulfilment of Title II requirements (e.g. safeguarding, ongoing capital) in respect of payments business conducted by the agent PI on behalf of the principal PI; rather, fulfilment of these requirements was a matter only for the principal PI. While some requirements under Title II affect operational matters (e.g. record-keeping), these could be delegated to the agent PI subject to the principal PI bearing liability for compliance with PSD requirements. Similarly, it is the principal PI that should be liable for the agent PI's conduct in carrying out Title III and IV obligations on behalf of the principal PI.

Furthermore, the respondent noted, under Article 17(2) the question arises as to whether the competent authority should exercise its discretion to list the agent in the register provided for in Article 13. This can only be considered in connection with the interpretation of 'agent'. If the interpretation is narrow (see this same respondent's comments on Article 4(22) above) and can be applied clearly and without uncertainty as to the reporting and registering obligations, then a register of agents may be feasible. Otherwise, the maintenance of the register of agents could become both unwieldy and subject to uncertainty as to its accuracy and purpose.

3.2.3.8 Recordkeeping (Article 19)

One respondent observed that it would be very helpful for prospective PIs if implementation measures gave a better understanding of the type of records that would need to be kept under Article 19.

3.2.3.9 Derogation from authorisation/supervision requirements for small payment service providers (Article 26, Q10-14)

Two respondents felt that, in order to ensure a level playing field and consumer protection at all times, no service provider should be excluded from any authorisation/supervision requirements.

One of these respondents also noted that it was not necessary to exclude small service providers from providing ancillary services, operating payments systems, or carrying out business activities other than payment services, as long as small service providers are subject to the same rules and requirements of the PSD as any other payment service provider.

3.2.3.10 Access to payment systems (Article 28)

One respondent noted that the language in paragraph 28(2)(c) was carefully drafted to reflect fundamental differences in scheme structure between proprietary payment systems and inter-bank consortia. These differences, together with the low market share of proprietary systems, are significant from a competition policy perspective, which is the perspective from which Article 28 was drafted. Even minor changes to the language of Article 28 should be avoided, or at least be carefully considered, in consultation with proprietary payment systems.

In particular, the respondent submitted, the provisions on access to payment systems in Article 28 were not intended to apply, and do not apply, to proprietary networks that are established and operated by a single payment service provider. Proprietary networks typically have direct contact with end-users, such as cardholders and merchants, regardless of whether in B2B, B2C or C2C contexts. This is in direct contrast to open, association-based systems, which have member banks as intermediaries between the payment service user and the payment system. This criterion is addressed in the first part of the Article 28(2)(c) exclusion.

The second part of the exclusion addresses the situation where a proprietary network exercises its right to licence the use of its intellectual property on a discretionary and select basis, including its trademarks and technology, in order to allow third party payment service providers to offer card services riding on the network. It recognises that such licensing arrangements are entirely at the discretion of the proprietary network, are strictly bilateral, and do not involve or permit the creation of direct links between licensees. Thus, for example, licensees of proprietary networks do not have the ability to agree fees in relation to the network, either collectively or directly with each other. Their sole contractual partner is the network owner, and all terms are negotiated independently and on a bilateral basis.

Therefore, the respondent insists, notwithstanding the granting of licenses to third parties, the proprietary network continues to act as a closed system, maintaining exclusive responsibility for the management of the network (i.e. as per the first part of the Article 28(2)(c) exclusion) and bilaterally clearing and settling card transactions with each licensee under terms negotiated specifically with that licensee (i.e. no possibility for licensees to either settle directly with each other or to agree fees directly with each other as per the second part of the Article 28(2)(c) exclusion).

3.2.4 PSD: Title III – Transparency of conditions and information requirements for payment services

3.2.4.1 Consumer protection and micro enterprises (Articles 30(2) and 51(3), Q15-16)

Pursuant to Articles 30(2) and 51(3), member states may provide that the provisions in Title III and/or Title IV are to be applied to micro enterprises in the same way as to consumers. As stated in Recital 20, micro enterprises are defined by Commission Recommendation 2003/361/EC of 6 May 2003 as businesses having a turnover and/or balance sheet not exceeding €2 million per year, and less than ten employees.

One respondent noted that applying the entire provisions of the PSD to micro enterprises in the same manner as to consumers would only be beneficial and advantageous to micro enterprises. While this should not involve any operational difficulties for micro enterprises, it would, on an operational and practical level, be easier for PIs not to have to distinguish between micro enterprises and consumers. Nevertheless, another respondent felt that the implications of the issue were not as yet clear, and that further discussion in a domestic context may be warranted.

Three other respondents, however, took a more negative view to the use of this discretion.

The first of these felt that micro enterprises enjoyed a sufficient level of negotiating power vis-a-vis their payment service providers, thereby allowing for the prevalence of contractual freedom with respect to the application of Titles III and IV. This differentiated micro enterprises' position from that of consumers, who should receive the benefit of a high level of protection. In particular, this respondent noted that the vast majority of merchants accepting payment cards would fall within the definition of micro enterprise. Accordingly, acquirers would only be entitled to contractually derogate from Titles III and IV with respect to those few 'large corporate' merchants, and, as a result, they would be faced with unreasonably high implementation costs which would not be objectively justified.

The second of these respondents submitted that PSPs should retain the ability to distinguish between consumers and business customers in deciding on the extent to which they should apply the provisions of Title III without the additional burden of verifying whether a business customer qualifies as a micro enterprise. The respondent noted that this burden was particularly high where a PSP engages in lines of business that provide services to a large number of commercial customers.

In such cases, the PSP will need to screen all customers in order to identify those that are micro enterprises. The screening process will necessarily require access to information that is not readily available to the PSP through public channels, because the definition of micro enterprise is based on criteria that would not normally be known to anyone but the customer (e.g. number of employees and annual turnover figures). The burden continues beyond screening and into the administration of payment services and accounts where, for every item under Titles III and IV, a PSP would have to track which business customers were micro enterprises and ensure alternative processes for handling such customers. In respect of fraud, a PSP could become liable for transactions conducted by employees of micro enterprises outside the scope of authority granted to them by the micro enterprise. These burdens would be disproportionate to any perceived benefits. Ultimately, the respondent notes, the burdens would increase costs for both PSPs and customers, and in particular for micro-enterprises.

The third of these respondents felt that, before these derogations are used, the full implications should be considered by the member states concerned, including, for example, that micro enterprises in member states using the derogation would be unable to use the SEPA Direct Debit Business-to-Business (B2B) Scheme once this is launched. The respondent also noted that any obligation to treat micro enterprises differently to other business customers would translate into a significant increase in the administrative burden of payment service providers. The respondent also felt that it should highlight the risks of an inconsistent implementation of this provision amongst member states and urged regulators to promote a harmonised approach towards micro enterprises, applying the same provisions to them as to other businesses.

3.2.4.2 Burden of proof on information requirements (Article 33, Q17)

Two respondents agreed that the burden of proof for the fulfilment of information requirements should rest with the service provider.

However, one of these felt that there should be clarification within the implementation measures as to how payment service providers are to satisfy this burden of proof, both at the pre-contractual and at the post-execution stage. For instance, the respondent felt that further clarification of what information would satisfy "in an easily accessible manner" under Article 36, and whether information on a website would be considered "easily accessible", would be useful.

3.2.4.3 Derogation from information requirements for low-value payment instruments and electronic money (Article 34(2), Q18-19)

Under both Articles 34(2) and 53(2), member states have the flexibility to adapt the thresholds set out in Articles 34(1) and 53(1) for providers of low-value payment instruments and electronic money. In particular, member states may reduce or double these thresholds for national payment transactions and increase the threshold to €500 for pre-paid instruments.

Two respondents urged Maltese regulators to make use of this derogation. One respondent felt that the use of this option would, within a domestic context, encourage the offering of new products to which a lighter regime would apply, and both suggest the doubling of the amount referred to in paragraph 1. The second of these respondents also took the view that the benefit of most low value instruments came from rapid transaction times and the ease and convenience of their usage in high transaction/low ticket environments. Extending the derogation from some of the Titles III and IV requirements applicable to such instruments would maintain incentives for providers of low value payment instruments and e-money and ensure a proportionate administrative burden.

A third respondent, however, reiterated the general point that discretions in relation to 'national payment transactions' are neither in the spirit of SEPA nor conducive to the integration of the payments market in Europe.

This respondent would even welcome confirmation that the intention behind the use of the phrase 'for national payment transactions' in Articles 34(2) and 53(2) was simply to make clear that different limits may be applied by member states for payment instruments or e-money dedicated to low value payment transactions when they are used within that member state, rather than implying that such payment instruments or e-money dedicated to low value payment transactions would, as a consequence, be restricted in their use to a purely national context.

3.2.4.4 Information provided prior to contract (Article 41)

One respondent suggested that the requirement to provide certain information "in good time" before the customer is bound by a framework contract should be drafted and interpreted so as to ensure alignment with a PSP's duties to provide similar advance disclosures under other legislation, e.g. distance selling and consumer credit legislation.

3.2.4.5 Information on maximum execution time and point of receipt of payment order (Article 42(2)(d) and (e))

Another respondent observed that Article 42(2)(d) and (e) in respect of information on the maximum execution time and point of receipt of a payment order were entirely irrelevant for a cardholder to know with respect to a card transaction. The respondent took the view that maximum execution time provisions were not intended to apply to card transactions, and that cardholders do not know or care to know when a merchant receives funds for card transactions, this being a matter for determination between the merchant and its PSP. Accordingly, it is maintained, these provisions should expressly not apply to cardholder disclosures or should expressly be limited to situations "where applicable".

3.2.4.6 Accessibility of information and framework contract (Article 43)

A respondent noted that clarification was required within implementing legislation in order to ensure that PSPs may charge PSUs for provision of information on paper. This would be in keeping with the aim of the PSD and the Lisbon Agenda to promote electronic payments, and would be consistent with the provisions in Article 47 (which allows member states to require PSPs to provide information on paper free of charge only in respect of monthly statements, as opposed to the general requests for information under Article 43). The respondent acknowledged that any such charges would have to be appropriate and in line with the PSP's actual costs. Alternatively, the same respondent noted, Article 43 could be interpreted to leave the choice of paper versus other durable medium to the PSP.

3.2.4.7 Changes in conditions of the framework contract (Article 44)

One respondent submitted that it was imperative that the interpretation of this article did not lead to a situation whereby a new service offered to a customer would be regarded as a change in 'framework contract' requiring the customer to wait two months before availability. In the same way, it should be clarified that any ad-hoc customer requests can be enabled directly and thus do not fall under the requirement of a lead-time of a minimum of 2 months, thus enabling, for example, one-off transactions to be permitted under a 'framework contract'. Additionally, the respondent said he would appreciate clarification that those aspects of a service that were not payment–related, and that were also agreed between a PSP and a PSU, would not be regarded as part of the ‘framework contract’.

3.2.4.8 Changes in interest or exchange rates to be calculated in a neutral and non-discriminatory manner (Article 44(3))

A respondent noted that this Article should not be understood to require a ‘one size fits all’ interest rate, and that it should not prevent an issuer from introducing changes to interest rates that were justified on the basis of objective, risk-based criteria – e.g. increasing rates for PSUs with an established record of defaults in payments. While this would distinguish between different types of customers, it would do so on objective, justifiable and neutral grounds and would therefore not be discriminatory.

The respondent understood that, in the absence of any specific, objective factors to justify differential treatment (e.g. risk-based factors), the application of different interest rate adjustments based on a single change in the reference rate would be discriminatory, but submitted that the application of Article 44(3) should be limited to this situation.

3.2.4.9 Termination of framework contracts (Article 45, Q20-22)

Article 45 allows member states to enact provisions more beneficial to users than those in the PSD in respect of termination of framework contracts. Three respondents, however, submitted that this discretion should not be used.

A domestic respondent noted that no cancellation fees apply in Malta in respect of any payment instrument, and that customers could terminate agreements at any time by giving notice. While the design/characteristics of products or services necessitated that particular terms and conditions could vary from one contract to another, key terms and conditions, such as termination clauses, were often worded in a standard manner for all products or services, though notice periods varied from one payment instrument to another. In this light, the respondent felt that more favourable provisions for PSUs were not necessary.

Another respondent felt that any extension of termination notice periods for PSPs under this provision would exacerbate the already difficult situation arising from the interplay between Articles 44(1), 45(1) and 45(3)[6] and offered little, if any, real benefit for PSUs beyond already favourable notice provisions.

The third respondent held that competition in the payments market would encourage PSPs to offer more favourable terms anyway. In addition, the respondent pointed out that it should be recognised that there would be circumstances in which the PSP must have the right to be able to terminate a contract with a user without notice, such as in order to ensure application of legal obligations such as anti-money-laundering requirements as well as in case of fraud against the payment service provider.

---

[6] The respondent submitted the following example: “Article 44(1) allows PSPs to amend terms under a framework contract with two months’ notice to PSUs. This could, for example, be an amendment to financial terms or to terms governing the process by which payment services are provided. A PSU may reject the amendment at any time up to the last day of the two-month notice period. At that point, either the PSU may terminate the agreement upon one month’s notice (per Article 45(1)), or the PSP may terminate upon two months’ notice (per Article 45(3)). In such case, the PSP would appear to be required to continue applying the pre-amendment terms, on a one-off basis, to the specific PSU that has rejected the amendment whilst the notice period for termination runs. In most cases, particularly where standard processes are involved, this will prove unmanageable. Extending the period of notice for termination by a PSP will only exacerbate the problem.”

3.2.4.10 Information for the payer/payee on individual payment transactions (Articles 47 and 48, Q23-28)

A number of articles in the PSD explicitly mention that information can be provided on paper or any other durable medium. However, Articles 47(3) and 48(3) allow member states the discretion to require PSPs to provide information on paper on a monthly basis free of charge.

Four respondents are of the view that this discretion should not be used.

The first two respondents believed that PSPs should be permitted to charge an appropriate fee for issuing paper statements to customers, as paper is more expensive and less efficient to handle than electronic communications. This would also be in line with the stated aim of the Lisbon Agenda (which has been a driving force behind the Directive), to make the EU the world's most advanced and dynamic knowledge- and technology-driven economy. These respondents noted that promoting paperless communication and record-keeping was a positive step in that direction and that the widespread use of computer and internet-based communications would make this an achievable goal. They also noted that the level of any fee would be limited to an appropriate level in line with the PSPs actual costs, as provided in Article 32(3).

One of these respondents, however, felt that it would be appropriate to carve out customers with special needs, e.g. the elderly or disabled, and allow them to receive paper statements free of charge.

Within a domestic context, two other respondents could see no reason that would justify the imposition of such a monthly paper-based information requirement. They argued that this would impose unwarranted costs and logistical pressures on banks, while information would already be available through various other channels (over the counter, through ATMs, 24x7 Internet Banking, statements sent periodically as agreed in framework contracts), as well as (where applicable) by means of the notice (receipt) sent to the customer following a transaction. These respondents, therefore, remarked that it should be possible for information to be provided in electronic format upon agreement by both parties.

With respect to Article 48(1)(a), one respondent felt there was need for clarification as to the meaning of "where appropriate" in the context of the requirement to provide "[...] any information transferred with the payment transaction". The respondent believed that, in line with common practice, it was essential that the phrase "where appropriate" should be interpreted as recognising the necessity for the payee's PSP to have some discretion in determining which elements of a payment instruction it could – for legal, contractual and practical reasons – pass on to a payee in any given circumstances. The respondent argued that this flexibility was essential in order to ensure that the payee's PSP would be able to comply with (for example) data protection law and other legal requirements, at the same time allowing the needs of different types of users and the potential practical constraints of certain communication channels to be taken into account. The respondent noted that the same interpretation would also need to apply in respect of Articles 37(2), 38(a) and 39(a).

3.2.5 PSD: Title IV – Rights and obligations in relation to the provision and use of payment services

3.2.5.1 Information on surcharging (Article 50(1))

Where surcharging is practiced, Article 50 requires merchants (as payees) to "inform" their customers of surcharges "prior to the initiation of the payment transaction".

According to one respondent, further elaboration on these phrases in implementing measures is advisable. It should not be possible, for example, for a merchant to ‘surprise’ a customer with a surcharge only after a customer had purchased the goods and services for which payment was still outstanding – e.g. by notifying a restaurant patron of a surcharge only after the patron had ordered and eaten. The language should therefore be altered slightly to read, for example, “prior to placing an order for purchase or, if no purchase is involved, prior to initiation of the payment transaction”. Similarly, information should not be disclosed in a way that a reasonable customer would not notice (e.g. in small print on a label attached to a cash register at the back of the premises). Implementing legislation should therefore also provide that “such charges shall be conspicuously displayed at the place of purchase”.

3.2.5.2 Out-of-court redress procedure for enterprises and organisations (Article 51(2), Q29)

Article 83 of the PSD provides that member states are to make out-of-court complaint and redress procedures available to PSUs, using existing bodies where appropriate. However, member states are allowed the discretion, by way of Article 51(2), to restrict the availability of such procedures to consumers.

One respondent believed that such a restriction should exist, as businesses (including micro enterprises) already dealt with legal matters and court procedures in respect of non-regulated services provided to them. This respondent felt that it would be inappropriate to grant non-consumers the same rights to out-of-court redress procedures as consumers, as such procedures were aimed at individuals who would otherwise be deterred from bringing a claim due to the complexities and costs of pursuing claims in court. Such procedures, the respondent felt, were not aimed at protecting sophisticated commercial clients that were capable of resolving commercial disputes through negotiation, mediation, arbitration, court or other agreed means, and that regularly did so in other contexts. Guaranteeing access to the financial ombudsman to such clients could lead to abuse and waste of ombudsman resources.

Another respondent took the opposite view and could find no reason why out-of-court redress should not be possible for enterprises and organisations too.

A third respondent, while not finding any reason in principle why out-of-court redress should not be possible for enterprises and organisations, questioned how such an extension of scope would be possible within the domestic context. This because consumer complaints are currently dealt with, *inter alia*, by the Consumer Claims Tribunal and the MFSA Consumer Complaints Manager, both of which only deal with complaints made by individuals.

3.2.5.3 Consumer protection and micro enterprises (Article 51(3))

Pursuant to Article 51(3), member states may provide that the provisions in Title IV are to be applied to micro-enterprises in the same way as to consumers. As this discretion runs parallel to the discretion in Article 30(2) in respect of Title III, both are discussed together above under title 3.2.4.1 of this document, entitled ‘Consumer protection and micro enterprises (Articles 30(2) and 51(3), Q15-16)’.

3.2.5.4 Charges applicable (Article 52)

Article 52(1) provides that PSPs may not charge for the fulfilment of “information obligations or corrective and preventive measures under” Title IV unless otherwise specified within the Directive. A respondent noted that, in order to promote a level-playing-field across all member states, and to have operational planning certainty for PSPs, clarification on the exact obligations and measures covered by this provision was necessary. In particular, the respondent wondered whether this provision should be read in conjunction with Article 42(5), which lists what it understands to be the preventive and corrective measures under Title IV.

With respect to Article 52(2), another respondent noted that this paragraph mandated use of the SHARE charging principle where a payment transaction does not involve any currency conversion. However, in the context of four-party payment card schemes, the sharing of the costs and revenues to operate the scheme took place mainly through the interchange fee as an inter-bank cost balancing mechanism. Recital 41 acknowledges this situation and stipulates that: "The provisions on the amount transferred or any charges levied have no direct impact on pricing between payment service providers or any intermediaries". Accordingly, in the view of the respondent, this should be made clear in measures transposing Article 52(2).

3.2.5.5 Payment of charges applicable (Article 52(3), Q30-32)

As discussed above, Article 52(2) mandates use of the SHARE charging principle where a payment transaction does not involve any currency conversion. However, the PSD does allow merchants the right to request a charge from, or offer a reduction to, the payer in respect of the use of a given payment instrument. Nevertheless, the national legislator, by way of discretion, may limit or altogether forbid such requesting of charges from the payer.

One respondent believed that this discretion should be made use of, and that the requesting of charges should be limited in a way that encouraged electronic payments rather than payment by means of less efficient payment instruments (cash and cheques).

A second respondent noted that all charges should come under the regulator's scrutiny whilst allowing for fair competition. However, this respondent acknowledged that, whilst the right of the payee to request a charge from the payer may promote the use of more efficient instruments, it could also lead to abuse. In this regard, the respondent strongly recommended that the practice should be prohibited altogether.

A third respondent discussed the issue in depth, also strongly encouraging the prohibition of surcharging for the use of electronic payment instruments, and seeing no reason why the surcharging prohibition should cause difficulties for merchants competing efficiently in their sector. If, contrary to these suggestions, surcharging were to be permitted, the respondent considered that there should be a requirement for full price disclosure from the outset regarding the total final amount payable for goods or services, and this in the interests of transparency, fairness and consumer protection. In particular, this respondent noted that guaranteeing merchants the right to surcharge for the use of electronic payment instruments:

- is unfavorable to consumers;
- ignores or undercuts the value that electronic payment methods bring to merchants and to society at large. There are a number of social benefits that are not internalised by merchants when making surcharging decisions - for example, the reduced risk of fraud, money laundering, and tax evasion. Additional social benefits not taken into account by merchants include improved forensic evidence in criminal investigations, lower cheque clearing costs for banks and less cash handling for central banks. Prohibiting surcharging for the use of electronic payment instruments would play an important role in addressing these market failures;
- undermines public policy aims to move away from paper-based payment methods. Surcharging for the use of electronic payment instruments sends the wrong signals to consumers by favouring less efficient payment methods, such as payments in cash and by

means of cheques, where the total costs (both to the merchant and to society) are less transparent but are nonetheless significant;

- bolsters the market power of large merchants vis-à-vis smaller merchants and inhibits the ability of new, electronic-based payment methods to emerge and gain popular acceptance. The more dominant a merchant is in a particular sector and area, the more such a merchant will be able to surcharge profitably. Where surcharging is permitted, dominant merchants, and the dominant schemes, tend to be the main beneficiaries, with niche players and new entrants suffering disproportionately from the practice;

- disrupts the balance of demand in credit/charge card networks, with harmful consequences. In the medium to long term, surcharging impacts negatively on credit/charge card network participation by deterring card usage, which in turn diminishes the value to merchants of participating in the network, thereby undermining the network's viability. Permitting surcharging practices for credit and charge card payments enables merchants to transfer the cost of card acceptance directly onto the cardholder while obtaining - effectively for free (and typically at a profit) - the many benefits of card acceptance and ignoring altogether the social benefits of card usage. In the medium to long term, this impacts negatively on network participation by deterring card usage. This in turn diminishes the value to merchants of participating in the network, thereby undermining the network's viability;

In the respondent's view, therefore, as social costs and benefits are relevant to an overall efficiency assessment, and as efficiency of payment instruments can only be assessed in relative terms by comparison to all payment methods (including those not covered by the PSD), this wording should be interpreted to take into consideration both efficiency to the parties involved (merchants, cardholders, payment systems and payment service providers) and to society at large (e.g. by generating social benefits from reduced money laundering and tax evasion and reduced public and private funding of cash printing and handling). For the reasons outlined above, and in the light of these considerations, the respondent considered that surcharging for the use of electronic payment instruments should be prohibited.

3.2.5.6 Derogation from certain rules for low value payment instruments and electronic money (Article 53, Q33-35)

As this discretion runs parallel to the discretion in Article 34(2) in respect of Title III, both are discussed together above under title 3.2.4.3 of this document entitled 'Derogation from information requirements for low-value payment instruments and electronic money (Article 34(2), Q18-19)'.

3.2.5.7 Notification of unauthorised or incorrectly executed payment transactions (Article 58)

Article 58 states that the user may obtain rectification from the payment service provider only if he notifies the provider "without undue delay on becoming aware of any unauthorised or incorrectly executed payment transactions […] and no later than 13 months after the debit date […]".

Within this context, two respondents note that, at first sight, the period of 13 months granted to the user to notify the service provider seems at odds with the notion of 'without undue delay' referred to in Articles 56(1)(b) and 58. In their view, allowing PSUs to dispute a transaction within a timeframe of up to 13 months after the transaction would be unworkable, and that both PSPs and society at large would not benefit from the ability of fraudsters to continue perpetrating up to 13 months of fraud whilst a PSU failed to check monthly statements. The respondents felt that the 13-month deadline was meant to address the situation of providers with yearly statements. In order to avoid any abuse of such provision, they invited the Maltese legislator to clarify the concept of 'without undue delay' in implementing legislation.

In this respect, it was suggested by one of the respondents that it should be explicit in the implementing legislation that a service provider could legitimately assume that a cardholder had become aware of an unauthorised transaction as soon as he/she received his/her statement and, accordingly, had an obligation to notify the unauthorised use, without undue delay, upon such receipt. Thus, where statements were made available on a monthly basis, the notification should occur well before the 13 months' maximum period being suggested. Indeed, in order to avoid any legal uncertainty, the Maltese legislator should expressly state that the user had an obligation to notify his service provider of any unauthorised transaction within one month of receiving his or her statement.

3.2.5.8 Evidence of authentication and execution of payment transactions (Article 59)

One respondent remarked that the last requirement of Article 59(1) required PSPs to prove a negative – i.e. to prove that authorisation of a transaction was "not affected by a technical breakdown or some other deficiency". The respondent submitted that, as it was theoretically impossible to prove a negative, further interpretation of the meaning of this clause was needed, particularly in the context of card transactions. For example, PSPs could have internal processes that tracked the various types of systems breakdowns or errors that occured on a given day. If the need to disprove the link between authorisation and technical breakdown were to become relevant, PSPs should be able to rely on these internal processes to determine whether there were any breakdowns or other errors that could be relevant to recording a transaction.

This respondent also noted that Article 59(2) provides that "use of a payment instrument recorded by the payment service provider shall in itself not necessarily be sufficient" to prove authorisation. The respondent felt that a narrow interpretation of the word 'use' is needed so as not to capture the means of authorisation or consent itself, as agreed between the PSP and the PSU under Article 54. For example, the entry of the correct PIN (as the agreed means of authorisation by the cardholder) should be sufficient to prove authorisation. The respondent pointed out that a broad interpretation of 'use' which captured the means of authorisation itself would disincentivise the development of new, more secure means of authorisation, as PSPs would stand little to gain if transactions authorised with the new technique were no less susceptible to unfounded claims of fraud. Thus, the respondent argued, Article 59(2) should be understood to ensure that PSPs should not rely solely on the provision of readily visible card details, e.g. CVV/CVC codes and expiry dates, coupled with the fact that a transaction was completed with these details, to prove authorisation.

A second respondent felt that the wording of Article 59 appeared to suggest that use of the PIN was not, prima facie, evidence that the cardholder had authorised a disputed transaction. Should the payment instrument also not be reported as lost, stolen or compromised, however, the respondent believed that use of the PIN in addition to this fact should be considered sufficient proof.

3.2.5.9 Payment service provider's liability for unauthorised payment transactions (Article 60)

Three respondents noted that, under Article 60(1), in the case of unauthorised payment transactions, the payer's PSP had to immediately refund to the payer the amount of the transaction. However, Article 60(1) failed to specify the event upon which a PSP must "immediately" refund the transaction.

The respondents understood that the meaning of paragraph 1, when read in conjunction with article 59 (which provides an obligation for a PSP to prove the authenticity of a disputed transaction), is that the requirement for an 'immediate' refund to the payer applies only once an investigation into the disputed transaction had been conducted and the PSP had been unable to prove that the payment was authorised. In this light, the respondents suggested that the transposition measures should clarify that the PSP is to refund the payer "immediately upon determining that a transaction is unauthorised".

3.2.5.10 <u>Payer's liability for unauthorised payment transactions (Article 61, Q36-37)</u>

Article 61 provides that the maximum liability of a payment service user for unauthorised transactions is of € 150, subject to certain conditions. However, by way of discretion, member states may reduce this amount in the user's favour at national law.

With reference to the domestic situation, one respondent noted that there were large volumes of unauthorised card transactions originating principally from the Internet, and that it is estimated that the proportion of cases where the user was to blame for such transactions, as opposed to genuine cases of loss despite normal use, were in the region of 50% / 50%.

However, the respondent notes, it is always very difficult/onerous for banks to prove intent in the above-mentioned cases. The respondent felt that the current applicable Central Bank Directive No. 4 on Electronic Payment Services is not sufficiently clear as to the extent of the obligations and liabilities of both the cardholder and the bank, while the 13-month notification period indicated in Article 58 of the PSD would add to this uncertainty.

A second respondent agreed with the reasoning expressed in the last paragraph of page 24 of the Bank's Consultative Document.[7]

Other than this information, the Bank received no views on whether this discretion should be utilised or otherwise.

3.2.5.11 <u>Refunds for payment transactions initiated by or through a payee (Articles 62 and 63)</u>

Under Articles 62 and 63, "a payer is entitled to a refund from his payment service provider of an authorised transaction initiated by or through a payee which has already been executed, if […] (a) the authorisation did not specify the exact amount of the payment transaction when the authorisation was made; and (b) the amount of the payment transaction exceeded the amount the payer could reasonably have expected […]". Transactions initiated by a payee include direct debit transactions, while transactions initiated through a payee include card transactions.

One respondent noted that it understood this provision to cover card transactions in case of 'no shows', damages to a rented car, mini-bar charges, etc., but would welcome further explicit guidance as to (i) what type of payment transaction fell within the scope of this right of refund and (ii) what constituted an 'unreasonably high amount'.

Another respondent noted that Article 63(1) provided PSUs with eight weeks from the "date on which funds were debited" to request a refund of an authorised transaction under Article 62, and that this language was different from the language used in Article 58 in respect of unauthorised

[7] The paragraph referred to states: "A higher liability limit (up to € 150) acts as an incentive for users to keep their payment instruments secure and avoid unauthorised use and fraud. However, a lower liability limit acts as an incentive for payment service providers to invest in increased security features, to better detect fraud, and spreads the risk of loss, theft and misappropriation across the pool of service users. Thus the balance to be struck relates to levels of avoidable unauthorised use through the better conduct of users – if there are substantial gains to be made here, a higher liability limit may be justified."

transactions, for which a PSU is given 13 months "from the debit date". It notes that the language in Article 63(1) does not make sense in the context of a card transaction because there are no "funds debited" except in the case and at the point when the card issuer collects payment by direct debit from the cardholder's bank account. The respondent therefore felt that this wording should be clarified within the transposition measures.

Article 62 refunds are subject to a 10-day response time for a PSP to either refund the cardholder or justify refusal of the refund, in terms of Article 63(2). Within this context, a respondent remarked that, where a cardholder disputed the amount of a card transaction under Article 62(1), the issuer would initiate an investigation involving not only the issuer and its staff, but also the merchant acquirer, the card network and, ultimately, the merchant himself. This is not a process entirely under the issuer's control, and typically firm answers to a cardholder's queries about the reasonableness of the amount of an authorised transaction are not available within the 10-day response time required under Article 63(2). Thus, issuers often process temporary credits to the cardholder's account until a final determination on the merits of the cardholder's dispute is made. In this light, the respondent submitted, these temporary credits should be expressly deemed sufficient to fulfil the requirement under Article 63(2) to refund the cardholder within 10 days. Alternatively, it should be possible for the issuer to refuse the refund under Article 63(2) on the basis that the merchant or merchant acquirer had not responded to the issuer's inquiries, subject to ultimate resolution within a reasonable period.

3.2.5.12 Point in time of receipt of funds (Article 64)

Article 64 provides that the point in time of receipt of a payment order is to be considered the time when a transmitted payment order is received by the payer's PSP. However, Article 64(2), *inter alia*, allows the PSP and PSU to agree that the point in time of receipt is instead to be the "day on which the payer has set funds at his payment service provider's disposal".

One respondent noted that the "day on which the payer has set funds at his payment service provider's disposal" must not be interpreted in relation to the receipt of a payment which is still subject to clearing (e.g. receipt of a cheque), but in relation to the actual receipt of cleared funds. Interpretation otherwise would force the PSP to comply with the PSD's execution times at a point in time when it is not yet certain that funds will clear, thereby exposing it to credit risk, which in the case of large transactions could be substantial. The respondent requested clarification in this regard in the transposition measures.

3.2.5.13 Refusal of payment orders (Article 65(2))

One respondent noted that Article 65(2) did not appear to be relevant to card transactions. The paragraph assumes that receipt of funds by the payee is crucial to the payer's interests (presumably because the payer is not deemed to have paid the payee unless the latter actually receives the funds). However, this is not the case for card transactions, in which the receipt of payment by the merchant from its acquirer is independent of cardholder-issuer relationship and in which the acceptance of a card by a merchant constitutes payment by the cardholder in itself. Therefore, in order to avoid confusion in the market, the respondent proposed that implementing legislation should clarify that Article 65(2) is not applicable to card transactions.

3.2.5.14 Irrevocability (Article 66)

One respondent believed that clarification was needed regarding the applicability of the provisions of Article 66 to different types of payment transactions. The respondent believed that, in respect of card transactions, the only applicable provision was in Article 66(2). This means, essentially, that once a cardholder has given his consent for a transaction (by means agreed between the card issuer and the cardholder, e.g. by signature, PIN or other agreed means), there was no right of revocation. The respondent submitted that Article 66(4) was not applicable because it relates to Article 64(2), which in turn relates to execution times under Article 69 which, the respondent maintained, does not apply to card transactions (see the discussion under title 3.2.5.17 below).

Article 66(2) provides that "Where the payment transaction is initiated by or through the payee, the payer may not revoke the payment order after […] giving his consent to execute the payment transaction to the payee". Another respondent submitted that card transactions would therefore be deemed to be irrevocable after the payer has transmitted his consent to the merchant, e.g. by entering his PIN code.

In this light, the respondent noted that Recital 39 suggests that such irrevocability does not affect the chargeback procedures and rules in the event of a dispute between the payer and the payee. In such a case, the reimbursement of the payer would be considered to be a new payment order. The respondent therefore suggested that, in order to avoid any doubt, the Maltese legislator should make it clear that the principle of irrevocability did not conflict with other legal or contractual rights, such as cooling off or chargeback rights. Indeed, although merchants typically benefit from a payment guarantee, the acquirer is entitled to claim the money back from the merchant under certain circumstances (e.g. repudiated MOTO transactions, absence of authorisation requested by the merchant on transactions above the floor limit, etc.). Likewise, the same respondent argued, the cardholder should be allowed to claim reimbursement in certain circumstances (goods not as described, processing errors, etc.) despite the principle of irrevocability of payments.

3.2.5.15 Execution times, value dating, and liability for non-execution or defective execution (Article 69 (and 64, 73, 74, 75 and 77))

Two respondents submitted that Article 69, which provides for D+1 and D+3 payment periods, was not intended to apply to card payments, as the pay period for merchants submitting charges and receiving payment from their acquirers is a matter for negotiation on a case-by-case basis and in part a function of the price merchants pay for acquiring services. Besides, payment between an acquirer and a merchant was independent of payment between a cardholder and issuer, or between an issuer and an acquirer. Article 63(1) and (2) generally proscribe a D+3 or D+1 (after 2012) maximum execution time for payment transactions. However, pursuant to Article 69(3), the "payee's payment service provider [is required] to transmit a payment order initiated by or through the payee to the payer's payment service provider within the time limits agreed between the payee and his payment service provider, enabling settlement, as far as direct debit is concerned, on the agreed due date". Two respondents noted that this allowed the payee and his payment service provider (by way of derogation from Article 63(1) and (2)) to agree on maximum execution times for both direct debit and card transactions. For the sake of clarity, therefore, the respondents urged the Maltese legislator to confirm explicitly that, as far as card transactions are concerned, the acquirer and the merchant benefit from complete contractual freedom in relation to execution time.

One of these respondents further submitted that, as Articles 64, 73, 74(2) (second and third paragraph), 75 and 77 are related to Article 69, they are similarly not applicable to card transactions:

- Article 64 (point in time of receipt of payment order) is relevant only in relation to Article 69 and other related provisions which are not applicable to card transactions;

- Article 73 deals with value dating in the context of a non-card transaction involving the movement of funds through a payment system (the issue covered under Article 69). To speak of ensuring, in a card transaction, that a payee's PSP (i.e. a merchant acquirer) credits the payee's (merchant's) payment account no later than the business day on which the acquirer is credited with the funds is to ignore the way in which card transactions are structured;

- The second and third paragraphs of Article 74(2) require a payer's PSP to make reasonable efforts to "recover the funds" in a payment transaction involving use of an incorrect unique identifier. However, if a charge or credit cardholder provides an incorrect card number, then (assuming the transaction is completed, which is difficult to imagine in any event due to process controls) there would be no funds to be "recovered" by the cardholder. It may theoretically be possible that another card account, with the card number provided in error, could have been debited (again, it is difficult to imagine how this would happen in practice), in which case the issuer would have obligations to refund that cardholder. However, this would be a refund for an unauthorised transaction under Article 60 and not a recovery of funds under Article 74(2);

- The first paragraph of Article 75 imposes obligations on PSPs in so called 'pull' transactions initiated by or through the payee (to which card transactions belong per Recital 43) to ensure "correct transmission of the payment order to the payment service provider of the payer in accordance with Article 69(3)." Article 69, as mentioned above, is not applicable to card payments. In this case specifically, Article 69(3) requires a payee's PSP to 'pull' funds from the payer's PSP in a timely manner. While this may be the case for other 'pull' transactions, such as direct debits (which are specifically referred to in Article 69(3)), it is not the way that card transactions work. As described above, payment to the merchant by an acquirer is independent of payment to the issuer from the cardholder or to the acquirer from the issuer;

- The second paragraph of Article 75(2), which requires crediting of a payee's account by its PSP immediately upon receipt by that PSP of funds in its account, similarly assumes, incorrectly, that all so called 'pull' transactions initiated by or through the payee funds involve a 'pull' of funds physically from payer to payee, and that the payee cannot receive payment until such funds are credited to its PSP's account. Again, this makes sense for other 'pull' transactions, such as direct debits, but it is not the way that card transactions work. The amount owed to a merchant by an acquirer does not depend on receipt of funds by the acquirer from the card issuer and is a debt recorded by the acquirer for payment to the merchant at the end of the payment period agreed between the acquirer and the merchant. In the case of some payment schemes, the debt is discharged by payment to a merchant bank account held by another institution;

- The third paragraph of Article 75(2) elaborates on the consequences of the first and second paragraphs of Article 75(2) and is therefore also not applicable;

- The final paragraph of Article 75(2) is also inappropriate for card transactions. It draws on the previous paragraphs and places an obligation on PSPs to 'trace' a non-executed or defectively executed payment transaction regardless of liability. Similar to the requirement on PSPs to 'recover the funds' under Article 74(2), the obligations under this paragraph make no sense in a card transaction where there is no physical 'pull' of funds to be traced;

- Article 75(3) is based on the assumption that there has been a non-executed or defectively executed transaction under Article 75(2). As Article 75(2) does not apply to card transactions, neither should Article 75(3) (note that Article 75(1) does not apply to card transactions in any event because it is focused on 'push' transactions initiated by the payer);

- Similarly, Article 77 applies only in the context of a breach of Article 75. As Article 75 does not apply to card transactions, neither should Article 77;

In order to avoid confusion in the market, this respondent proposed that implementing legislation should clarify that these provisions are not applicable to card transactions.

3.2.5.16 Cash placed on an account (Article 71)

Article 71 regulates the time of availability and value dating of cash placed on a payment account, and draws a distinction between the rules applicable in respect of consumers and those applicable in respect of PSUs that are not consumers.

One respondent submitted that the 'payment service user' to which the article refers must be interpreted as referring to the holder of the payment account rather than the person making the cash placement. This appears to the respondent as the most appropriate interpretation in terms of achieving the consumer protection aims of the legislation whilst also bringing clarity and certainty to the operational processes that PSPs will need to follow. It would mean that where the PSU is a consumer, he will be entitled to the benefit of the provisions in the first sentence of the article, regardless of who has actually made the cash placement. The respondent submitted that, in identifying the 'point in time of receipt' for the purposes of this article, it is essential to ensure technical workability and that the same principles of interpretation should apply as are applied to the same phrase in Article 64 and other related articles. This approach would allow for receipt other than on a business day to be deferred to the next business day and for cut-off times to be set near the end of a business date. This is very important from a practical perspective – as, for example, it would allow for a wide range of convenient methods of cash placement to be offered to PSUs, such as via a deposit box in a branch, or via a nightsafe or collection by cash transporter, which may be an agent of either the customer or the PSP.

Furthermore, the respondent pointed out, it is essential that the article is read as not preventing PSPs form making subsequent adjustments to the PSU's account in cases where this was necessary. For example, upon the receipt of coins and banknotes, credit institutions are bound to execute fitness and authenticity verifications in compliance with National Central Bank requirements before the cash received can constitute 'funds'. This interpretation would facilitate the possibility of immediate availability after receipt - in line with the article - by recognising the principle of the possible need for later adjustment to the PSU's account as a result of processes which may not be undertaken by the PSP until a later stage, such as checks for anti-money laundering and antiforgery detection measures. The respondent saw this interpretation and approach as being entirely supported by the reference in Article 78 to PSPs' being bound by "other legal obligations covered by national or community legislation".

3.2.5.17 Shorter execution times for national transactions (Article 72, Q38-42)

Article 72 allows member states to reduce Article 69 execution times in respect of purely national payment transactions. One respondent commented that, in the light of argumentation set out under title 3.2.5.15 above, implementing legislation should clarify that this provision was not applicable to card transactions. Two other respondents, however, presented opposing views as to whether this discretion should be utilised.

The first respondent noted that, subject to complete and accurate information being given by the customer, credit transfers in Malta are currently effected within D+3 as per the relevant SEPA rulebook. Upon request by the customer, however, an urgent payment can be effected on the same day as a priority payment.

In the view of this respondent, maximum execution times as set out in the PSD should not be reduced for national payment transactions. It is argued that such a reduction would give rise to a further distinction between national and cross border payments and at the same time would necessitate further operational changes for institutions. The respondent noted that one should keep in mind that the SEPA and the PSD had triggered and necessitated a radical overhaul of domestic infrastructure, regulations and standards. In the absence of a domestic CSM, making the domestic payment system SEPA and PSD compliant already entails a significant amount of investment. In this light, the respondent maintained, the same terms and conditions should apply to local and cross border transactions indiscriminately, and that different rules would counter the spirit of SEPA – moving to a harmonised and integrated payments market in Europe with one payment system for all euro transactions.

The second respondent, however, felt that 'domestic' payments with delays of more than one day should not be tolerated. The same respondent held that, in accordance with practices existing before SEPA migration, it was imperative that 'domestic' payments should be effected either in 'real time' or within one day. Alternatively, thresholds should be established whereby retail amounts would be processed within the one-day limit whilst wholesale amounts would be effected in 'real time'.

3.2.5.18 Value date and availability of funds (Article 73(1))

One respondent understood that article 73(1), first paragraph, made clear that if the day on which the amount of a payment transaction is credited to the payee's PSPs account is not a business day for the payee's PSP in the sense of Article 4(27) of the PSD, then the value date for the credit to the payee's payment account may be (no later than) the next business day for the payee's PSP. By way of example given by the respondent, where a Spanish bank's account held with its Swedish correspondent bank is credited with a Swedish kroner payment on a day which is a local bank holiday in Spain, the Spanish bank would have had its account credited but, being closed on that day, would not be in a position to credit its Spanish payee until the next business day.

In the light of this consideration, the respondent submitted that it had always read the second paragraph of Article 73(1) as following on directly from the first paragraph, in the sense that the obligation to put the amount of a payment transaction at the payee's disposal 'immediately' pre-supposes that the credit to the payee's PSP's account had happened on a business day for that PSP. From a practical perspective, the same respondent submitted, it was essential that the core legal requirement should incorporate the reality that if a payee's PSP is unable to credit the payee's payment account on a non-business day it may equally be unable to put the funds at the payee's disposal on that day.

Separately, the respondent said he would welcome confirmation that Article 73 allowed PSPs to take into account the terms and conditions of the payment account in question, and also that in cases where funds have been credited to an account in error, the backdating of value in the correcting entries would still be allowed (on the basis that this would be a correction of the original transaction rather than a new and separate payment transaction).

3.2.5.19 Data Protection (Article 79)

Article 79 permits the processing of personal data by payment systems and payment service providers when this is necessary to safeguard the prevention, investigation and detection of payment fraud, in accordance with Directive 95/46/EC.

In this regard, one respondent noted that a strict application of data protection legislation had so far prevented the full deployment of fraud prevention tools. In this light, it believed that it was critical for the Maltese legislator to provide guidance as to the measures necessary to allow and facilitate the processing of personal data related to payment fraud by payment service providers, including the cross-border transfer of these personal data among payment service providers. In particular, the same respondent submitted, the Maltese legislator should:

i. recognise the legitimacy of such processing under Article 7 of Directive 95/46/EC (as implemented in Maltese data protection legislation);

ii. exclude the application of Articles 11,1 and 12 to such processing pursuant to Article 13, 1(d) of the said Directive;

iii. authorise such transfer under Article 26 of that Directive; and

iv. adopt derogations under Article 8(5) of that Directive to allow the processing of data relating to offences, criminal convictions or security measures by payment service providers.

3.2.5.20 Enforcement and redress (Articles 20, 21 and 80-83, Q 46)

No concerns or suggestions were received in respect of these Articles. One respondent, however, noted that clarification of what 'out-of-court complaint and redress procedures' would consist of in practice would be appreciated.

3.2.6 PSD: Titles V and VI – Final provisions

3.2.6.1 Transitional provisions (Article 88, Q43-45)

Article 88(1) provides that persons conducting payment services before 25 December 2007 in accordance with national law may continue to provide their services after implementation of the Directive, pending authorisation, until 30 April 2011 (18 months after the transposition deadline). In this regard, one respondent submitted that it was critical that the implementation of this provision is not limited to home state operations. The respondent argued that implementing language for Article 88(1) should clearly contemplate the ability of companies that had commenced payment services business in any member state – whether home or foreign, and whether through cross-border provision of services or through branches – to avail themselves of the clause. The same respondent contended that neither the plain language of Article 88 nor its spirit or intent suggested that it should be inapplicable to cross-border or branch operations of entities that are already engaging in payments business on a pan-European basis.

Thus, the respondent argued, even non-domestic legal persons who had commenced the activities of payment institutions within the meaning of the PSD before 25 December 2007 in accordance with the national law in force in another member state, and which were allowed to carry out those activities in Malta under Maltese law without requiring a license (be it through cross-border provision of services or through branches), should be able to continue providing those services in Malta transitionally until 20 April 2011 without authorisation being required under Article 10.

The respondent noted that restricting application of this clause to home state business would only prejudice the ability of those entities that are already operating cross-border to comply with licensing requirements, particularly as there is no guarantee that home state authorities will be prepared to grant PI licenses to these companies precisely on 1 November 2009 and, further, as it is not possible to grant such a license and complete the 'passporting' of the license all on the same day, given the notice periods for 'passporting'. Therefore, the respondent observed, without the ability to take advantage of Article 88, these entities would be placed at a competitive disadvantage vis-à-vis entities that do not yet operate cross-border or those that are licensed as credit institutions.

Article 88(2) provides that institutions that provide money transmission services in accordance with national law before 1 November 2009, and which are effectively included in the consolidated supervision of a parent undertaking (a credit institution), are exempted from authorisation as a payment institution provided they notify the competent authority of their activities by the date of entry into force of the Directive, including with such authorisation information that shows that they fulfil the criteria listed in Article 5 (a), (d), (g) to (i), (k) and (l) of the PSD. However, the Maltese legislator may allow the competent authority to exempt such institutions from showing that they meet these requirements under Article 5 of the PSD. One respondent submitted that the legislator should not allow this discretionary waiver of requirements in order to ensure at all times a level playing field amongst operators.

Article 88(3) allows the Maltese legislator to provide that any person that had already satisfied the requirements of Articles 5 and 10 of the PSD (which together constitute the criteria for authorisation), presumably because such person is already licensed as a financial or credit institution, may be authorised and registered automatically without further formality. Two respondents supported the transposition of this discretion into Maltese law.

Article 88(4) allows a transitional regime in respect of small payment institutions which have their authorisation requirement waived under the national discretion within Article 26 of the PSD. If the Article 26 option is availed of, Article 88(4) allows the national legislator to provide that payment institutions which are eligible for such a waiver may continue to provide payment services for a period determined by the legislator, not being longer than three years, before they are required to obtain a waiver and register in order to operate. One respondent noted that, as it did not agree that waivers under Article 26 should be allowed (as discussed under title 3.2.3.9 above), it saw no use for the implementation of this provision.

3.2.6.2 Relationship of the PSD with anti-money laundering / terrorism financing legislation (Articles 88(4) and 91)

One respondent noted that certain provisions within the PSD had important implications for the provisions of Directive 2005/60/EC (the third anti-money laundering/terrorist financing (AML/TF) Directive), and use the text “without prejudice to Directive 2005/60/EC [...]". In the light of this, the respondent was of the opinion that due care should be given to ensure that those instances in the Directive which provide for the observance of certain provisions of Directive 2005/60/EC (e.g. Article 88(4)) are expressly provided for in legislation transposing that Directive.

The respondent further noted that Article 91 of the PSD amends Directive 2005/60/EC. However, it advises the Central Bank that measures transposing the PSD need not take these amendments into consideration as they had already been included in Malta’s transposition of Directive 2005/60/EC.

3.2.7 PSD: Annex

3.2.7.1 Acquiring of payment instruments (Point 5)

Two respondents noted that the phrase “acquiring of payment instruments” was misleading in that it was not a payment instrument that was acquired. The respondents noted that this phrase was intended to cover ‘merchant acquiring’, as that term is commonly used, meaning the assumption by an entity of an obligation to pay a merchant that has agreed to accept a type of payment instrument as a means of payment from customers – in other words, it is the transaction, rather than the payment instrument, that is acquired.

One of these respondents suggested that the following wording could be used, should a definition of ‘acquiring’ be proposed within transposing measures: “An institution that participates in a payment system and agrees with a payee, to whom payment is made by a payer by way of acceptance by the payee of a payment instrument operating on such payment system, to process transaction data submitted by the payee and to make payment to the payee for such transaction.” The respondent further maintained that any such definition should not incorporate elements dealing with how the acquirer interacts with the payment system or other participants of the payment system, as this could vary from system to system and was in any event irrelevant to the key criterion, i.e. the obligation to pay a merchant. It should also not be specific to cards, as the concept of ‘acquiring’ could be applied to a number of different payment instruments (whether currently in the marketplace or yet to emerge).

3.2.8 Choice of legal instrument (Q47)

No comments were received in respect of this matter.

3.3. Other issues relevant to the implementation of the PSD

3.3.1 The repositioning of cash and cheques (Q48-51)

Various domestic respondents indicated their broad support of the approach proposed by the Central Bank of Malta, as set out in the Consultative Paper, in regard to the repositioning of cash and cheques. Throughout the consultative period, the Central Bank of Malta received positive and enthusiastic feedback from the public sector, credit institutions, financial institutions, the business community, constituted bodies and consumers. As such, it appears that a broad national consensus exists in respect of these issues, though much work may still have to be done in order to increase awareness in some quarters.

However, in addition to expressing general support, two respondents also made certain specific comments in writing.

The first of these, while describing the approach of the Bank as “commendable”, noted, nevertheless, that one needed to be very careful in the implementation of such an approach, particularly on account of the sensitivity of the subject and the negative impact it could have on the image of the banking industry. In particular, this respondent suggested, in pursuing such an approach the following initiatives needed to be carefully analysed/implemented:

- The repositioning of cash and cheques to modern means of payment needs to be gradual and spread over a reasonable period. A road map with clear milestones needed to be set;
- All stakeholders – the authorities, the business sector, consumers and the banks – needed to be actively involved in such a process;
- The Central Bank of Malta needed to be seen as a champion of such a project;
- A tactful on-going educational and marketing campaign needed to be designed and implemented;
- The tax on credit cards should be removed with immediate effect as it was acting as a disincentive and was discriminating negatively against Maltese financial operators;
- “e – purse” products should be developed by the banks with the rolling out of EMV technology on Maltese debit and credit cards;
- If such a change is implemented without a clear strategy, and involving all stakeholders, it could backfire and provoke a significant amount of resistance;

- Such a change needed to have the widespread support of financial services operators;
- Current legislation may be rather lacking or archaic vis-à-vis modern payment instruments. Hence new legislation may be necessary to strengthen the legal position and effectiveness of these payment instruments.

The respondent also noted that it did not believe that there was any cross-subsidisation involved in cash/cheque processing, taking into account the low/zero rate of interest offered by banks on the current accounts through which cheques operate.

The second of these respondents also voiced its agreement with the discussion initiated by the Central Bank of Malta regarding the repositioning of cash and cheques. It perceived that potential savings could be registered through the reduction of cash in circulation and cheques issued, to the benefit of the ultimate consumer. While the same respondent noted that over the past decade efforts had been made by Government to reduce the issuance of cheque payments to the greatest degree possible, much more remained to be done – particularly in other sectors of industry.

This respondent also understood the rationale discussed in the paper regarding the cessation of cross-subsidisation practices by commercial banks, though in this respect it called for a high degree of caution. In particular, the respondent agreed with the Bank's stance in that efforts must first be directed at *"the removal of false or negative incentives relating to electronic payment instruments, while causing the increase of charges where these may be easily justified."* Nevertheless, it maintained that extra effort must also be made for the promotion of more efficient electronic payment instruments within industry.

This respondent also agreed with the principle set out by the Bank regarding the automatic extinguishing of payment obligations, but indicated its wish to continue to be consulted in this regard in due course.

3.3.2 Cheques and other payment instruments (Q52-55)

As under the preceding title, various domestic respondents indicated their broad support of the approach proposed by the Central Bank of Malta, as set out in the Consultative Paper, in regard to cheques and other payment instruments.

In respect of the four objectives considered by the Bank in the light of its future policy on cheques and other payment instruments in the Consultative Paper, one respondent believed that all four objectives should indeed be pursued in Malta and made the following comments:

- The order of importance is (iv), (iii), (ii), and (i);

- *(iv) Rationalising the economic incentives apparent to cheque users by reducing cross subsidisation of cheque-related costs and causing the introduction of more transparent pricing* is of course commendable but needs to be carefully analysed and tied up to an associated strategy;

- *(iii) Mitigating fraud and credit risks* is certainly and at all times a very appropriate approach. Maltese banks have already taken a proactive role through the enactment of a self-regulatory Code of Conduct in order to tackle this issue. The banks have also recommended that the issuing of cheques for which covering funds are not available should be criminalised in all instances;

- *(ii) Removing legal or operational barriers preventing more efficient cheque clearing, in order to reduce costs and the duration of the clearing cycle,* is in fact required in order to enable full cheque truncation. Having said that, such a process, which could further improve the clearing cycle, should not be seen as incentivising the use of cheques when the intention is the contrary. Placing charges on the processing of cheques could be used as an instrument to cause migration from traditional to modern means of payment. In Portugal, for instance, whilst initially a cheque user could issue an unlimited amount of cheques for free, subsequently this amount was limited by the banks to fifty, until finally all cheques issued incurred a cost. Whatever approach is taken, it needs to be carefully analysed by weighing out both the advantages and disadvantages;

- *(i) Clearly laying down the rights and obligations of parties with respect to cheques* is an important aspect that needs to be addressed.

In respect of the specific measures set out under points (A) to (E) in the Consultative Paper, this respondent believed that:

- The measures contemplated in A would have beneficial effects;

- D and E are applicable, and would be beneficial if applied, in Malta;

- As regards C, while the legal framework governing cheque payments should be revisited, it is doubtful whether the PSD is the right instrument for this purpose;

- The measures in point B regarding cheque guarantee cards would not be beneficial if applied in Malta since they represented a step backwards to a procedure that has been discarded.

A second respondent noted that the objectives and measures considered by the Central Bank of Malta raise an important discussion which should be pursued. The respondent felt that the discussion warranted a structure to enable the parties concerned to delve deeper into each measure being proposed.

3.3.3 SEPA (Q56-57)

3.3.3.1 <u>SEPA Direct Debit Mandate migration</u>

One respondent noted that direct debit mandate migration was a critical issue for all SEPA involved parties. The respondent maintained that, if the consent given to the creditor by the debtor when signing existing direct debit mandates was not valid for SEPA direct debit mandates, and the signing of a new mandate were required, creditors would face such an extreme level of administrative burden and commercial risk that they would be reluctant to migrate to SEPA. member states needed to ensure that payment service providers and users were clear as to whether a legal problem existed in this respect and should work together with the payment industry to develop solutions to this problem. Proper transposition of Article 54 could be a way to ensure the continuity of consent. Article 44(2) could also be of assistance in this context.

3.3.3.2 <u>Facilitating SEPA implementation</u>

The possibility of early transposition of the PSD was considered under title 3.2.1.2 above. In relation specifically to the facilitation of SEPA, one respondent thought that early PSD implementation (i.e. transposition measures coming into force before 1 November 2009) would hinder rather than facilitate SEPA. In addition it would threaten the existence of a level playing field between SEPA countries. In this respect, the respondent believed that it was important that the transposed Directive should come into force at the same point in time in all member states (i.e. 1 November 2009).

Another respondent felt that early adoption of PSD implementing measures (which would not necessarily have to come into force earlier than 1 November 2009) would undoubtedly assist the market in its roll out of, and migration towards, SEPA instruments.

Other than as specifically described within the relevant sections within this document, respondents did not express any views on other regulatory options under the PSD or other initiatives discussed within the Consultative Paper that could be exercised in order to facilitate the attainment of SEPA objectives.

3.3.4 Value added services

3.3.4.1 E-invoicing and e-reconciliation (Q58-60)

One respondent listed the benefits and challenges it perceived in relation to e-invoicing or e-reconciliation within a domestic context:

Benefits:

- They are value-added services through which banks can earn extra income from their SEPA product portfolio;
- They would improve the overall liquidity of Maltese companies;
- They promote the utilisation of STP and modern electronic means of payments;
- They increase competition between Maltese and other European payment service providers.

Challenges:

- Getting Maltese businesses to develop XML compliant means of payment;
- Bridging the digital divide for technophobic firms;
- Financial and human resources required for implementing such a project in a timely manner;
- Understanding which business model to build on.

This respondent noted that several institutions may have plans to offer e-invoicing or e-reconciliation services in Malta in the medium term. Major factors affecting these institutions' decision included the financial viability of such projects and the incidence of other projects in the pipeline. The same respondent maintained that the Central Bank of Malta could assist in the roll out of e-invoicing and e-reconciliation services by creating a national awareness on the subject and by ensuring that both the Government and the domestic business sector followed this path.

A public sector respondent noted that e-procurement, e-invoicing and e-reconciliation might provide significant benefits to Government, amongst which are those relating to timeliness of transactions, automated processing, accuracy and reduction of human error. The respondent noted that projects were underway within Government for the implementation of a number of the above, although the introduction of both the PSD and SEPA would undoubtedly be a major contributing factor towards their successful implementation. The respondent further acknowledged that the Central Bank of Malta could give assistance to the Government in this regard, and suggested that this should form a basis for future bi-lateral cooperation.

Another respondent noted that the VAT Act, 'TWELFTH SCHEDULE (TAX INVOICE)', covered 'Invoices by electronic means' thus:

> *"11. Invoices containing the details specified in item 2, and subject to the acceptance by the customer, may be sent by electronic means, provided that the authenticity of the origin and the integrity of the contents are guaranteed as may be provided for by national legislation with regard to the use of electronic signatures, or as may be required and approved by the Commissioner."*

However, the 'THIRTEENTH SCHEDULE (FISCAL RECEIPTS)' contains no clause relating to electronic means. Therefore, the respondent submitted, there appeared to be an anomaly in that fiscal receipts issued electronically are not subject to the same conditions as tax invoices. In addition, the respondent remarked, under the provisions of the e-Commerce Act, fiscal receipts could be issued electronically, but the Commissioner of VAT couldn't approve solutions in the same way as for tax invoices. The respondent felt that, in the extreme, it could be argued that the absence of a clause implies that e-invoicing was allowed for tax invoices but not for fiscal receipts.

This respondent believed that the benefits of e-invoicing and e-reconciliation for business competitiveness were significant, and suggested that the Bank should work, with the Malta Standards Authority and other bodies, to rapidly promote existing standards for messaging, such as ISO 20022, to encourage adoption. The respondent felt that the introduction of such standards by banks would be an incentive for businesses to do the same - particularly with regard to e-reconciliation.

3.3.4.2 <u>E-commerce (Q61-62)</u>

One respondent did not see or envisage any legal or operational barriers of note in respect of the development of e-commerce in Malta. Nevertheless, the respondent believed that a more active role was required of the Central Bank in acting as a catalyst of change, particularly with Government departments and agencies.

3.3.4.3 <u>M-payments (63-64)</u>

In respect of m-payments, a respondent submitted that it had not identified legal barriers of note preventing the emergence of such services, but that an operational barrier existed in the form of the high costs of mobile telephony. Nevertheless, the respondent saw ample scope for the creation of a joint forum of cooperation between the Central Bank of Malta, the MFSA and the Malta Communications Authority to study regulatory issues related to m-payments, as well as possibilities for the facilitation of the emergence of such services.

Another respondent, however, noted that there was a significant disincentive to using m-payments in the form of taxes. The respondent noted that applicable legislation indicates that m-payments suffer 18% VAT and 3% excise tax on the total value being transferred, and this on top of the value of the m-payment (inclusive of VAT). The respondent felt that this situation made m-payment non-viable in Malta, even though it was an ideal platform for many non-cash payment scenarios and could move forward the e-society/e-economy while addressing the excessive use of cash and cheques in Malta. This is particularly the case if it is assumed that there are many more mobile phone users than users of chequebooks and debit- and credit-cards in the population. The respondent believed that legal and fiscal revision was required to exclude m-payment services from the taxes targeted at mobile communications and to permit telecom companies to operate m-wallets.

3.3.5 Special treatment and conditions for non-resident account-holders (Q65-68)

A respondent noted that payment services in Malta were generally openly offered to non-residents, though a certain conditionality existed with respect to the application of AML/TF requirements and certain operational considerations.

In particular, non-residents were always required to produce a bank reference, and increased due diligence is exercised where non-residents are concerned (based on the 'know your customer' rules; thus provenance of funds, with consequent proof/evidence, is also mandatory where non-residents are concerned). The respondent also noted that, AML/TF requirements aside, there were a few banking practices that discriminated against non-residents for operational reasons, (e.g. the requirement of cash cover of twice the limit allowed on a credit card). The respondent observed that otherwise practices generally varied very little in respect of residents and non-residents, and that the development of the SPM should not result in any changes in this context.

Another respondent, however, argued that various banking practices (e.g. the requirement of cash cover on credit cards, a mandatory bank reference for new clients) were applied by some banks not only in respect of non-residents but also in respect of Malta-resident non-Maltese citizens. This respondent felt that such requirements, when imposed upon Malta-resident EU-citizens but not Malta-resident Maltese citizens, may be prohibited by European law in the light of the EC Treaty prohibition of discrimination on the basis of nationality between EU-citizens. The respondent urged regulators and the banking community to look into the matter.

3.4. Concluding remarks (Q69-73)

One respondent noted that the PSD left a lot of room for exceptions/derogations and that this went against the spirit of having uniform laws throughout the EU. The same respondent did not see further barriers to the effective implementation of the PSD within the context of the infrastructure available to society today, as it believed that these were being adequately addressed by regulators and operators. The respondent identified, as the areas needing most improvement in order for the PSD to achieve its objectives: (i) ensuring a level playing field across borders for all operators, and (ii) bringing about a culture change in society to move users towards more efficient payment instruments. The respondent observed that operators would appreciate early feedback from the Central Bank of Malta regarding the options to be adopted and the tentative timetable for the implementation of the Directive.

Another respondent congratulated the Central Bank of Malta for the work conducted and for the resultant Consultative Paper. While the respondent felt that it had highlighted, in its submissions, the most important aspects that would need to be considered, on account of the highly technical aspects involved in many of the options available to the Maltese legislator, it urged the Bank to conduct further discussions in order that such aspects may be better understood before policy or legal decisions are taken.

4. WHAT HAPPENS NEXT

Following the successful completion of the consultation process, the Central Bank of Malta and the MFSA have set up a joint drafting group and are preparing draft legislative and regulatory implementation provisions.

An opinion of the European Central Bank shall be requested by the authorities preparing legislative provisions, if and where required by Malta's obligations under European law.[8] Draft texts shall be made available on the Bank's website pending response by the European Central Bank. While much of the PSD's implementation may be put into effect by subsidiary legislation or Central Bank Directives, any necessary Bill to amend the Laws of Malta shall be placed before Parliament in ample time for it to be passed before November 2009, the PSD's transposition deadline. Once all implementing measures have undergone legislative process, the Central Bank of Malta shall coordinate Malta's notification obligations towards the European Commission. In the light of the Commission's Better Regulation initiative, correlation tables showing the link between the provisions in the PSD and national rules shall be created by all authorities preparing legislative provisions, and shall be compiled by the Bank and be made available to the Commission.

---

[8] See Article 105(4) of the EC Treaty and Council Decision 98/415/EC on the consultation of the European Central Bank by national authorities regarding draft legislative provisions.