TREASURY, RISK AND FINANCE PROFESSIONALS
ACT

The Association of Corporate Treasurers

Comments in response to
Implementation of the Payment Services Directive – consultation
HM Treasury
December 2007

March 2008

The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance. Further information is provided at the back of these comments and on our website www.treasurers.org.

Contact details are also at the back of these comments.

We canvas the opinion of our members through our topic-specific working groups and our Policy and Technical Committee.

The ACT welcomes the opportunity to comment on this matter.

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General

In explaining your overall approach you state the principle of proportionality which you intend to promote, so long as it is not to the detriment of the consumer. For example you will seek to avoid information overload for end-users while ensuring they have sufficient information to exercise an informed choice. We fully support this stance. Later you explain your overarching approach to supervision where you intend to allow regulatory burdens to be minimised or simplified without reducing the benefits for customers so that, for example you will seek to avoid going beyond the minimum provisions necessary to

comply with the Directive unless exceptional circumstances arise. This exactly accords with the ACT's approach to regulation[1].

However we notice that in outlining your approach to implementation of Titles III and IV you say that "the overarching aim will be to keep in mind workability from the perspective of payment service providers." We do not support excessive regulation and information for the sake of it and clearly any proposals must be capable of working, but we would urge you to approach implementation from the perspective of giving priority to delivering an efficient and reliable payments environment that meets the reasonable needs of the customers. The "perspective" of the payment service providers is exactly the wrong point of view from which to start except in so far as service providers need common standards and access to systems so that they can compete among themselves in identifying customer needs, whether such customers are public sector, private sector, private sector or retail. In particular new entrants to payments services need the facilities mentioned in order to compete with the incumbents.

In responding to this consultation we have deliberately not answered every question you have asked. ACT members work in a variety of companies but there is a tendency for these companies to be at the larger end of the spectrum of size. We therefore are not in a position to represent views of the consumer or smaller enterprises and will not have a particularly strong interest in areas like money transfer services. Furthermore we consider the proposals from the viewpoint of non-financial services companies, so that we do not comment on many of the questions on Title II – the Prudential Regime.

Response to specific questions

Chapter 2: Scope of the Directive and definitions used

5. Do you agree with the interpretation of negative scope? Are you aware of activities or business models that might unintentionally fall within scope of the PSD?

A5 In many groups of companies certain receipts and payments functions are amalgamated into a central company for efficiency of administration or cash management. This company is thereby facilitating the flow of funds between the group company and an external third party and might fall unintentionally within scope of the directive, however we note that the negative scope of Article 3 (n) should remedy this, and this is an important provision which should not be reduced in scope.

6. Are there any concerns or issues you would wish to raise with respect to the interpretation of any definitions in the Directive?

A 6 Business Day in Art 4.27 is in essence any day where payment mechanisms are open for either the payer ***or*** payee. Once the D+1 timescales in Art 69 are in force it is conceivable that a credit will be required to the payee's payment service provider's

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[1] ACT Policy & Technical Manifesto: http://www.treasurers.org/technical/resources/manifestoMay2007.pdf

- Regulation commonly represents a barrier to entry, restricts competition and innovation and increases costs. It should thus normally only be used as a last resort where there is evidence of an actual or potential market failure or in quasi-monopoly areas where competition is insufficient, industry codes etc. have failed and where the public good from regulation manifestly exceeds the costs it engenders.
- Where regulation is to be applied it should be with a bias towards light-touch- and principles-based regulation to lower costs and preserve as much flexibility as possible.

account on a day that is not a business day in that country even though it is a business day for the purposes of the PSD.

Chapter 3: Title II: the prudential regime

15. Should non-hybrid firms have to safeguard user funds in a similar manner to hybrid payment institutions? What would be the costs and benefits of this?

A15 We believe you are right to highlight the potential anomaly that hybrid payment institutions will have to provide a ring fencing of funds received from payment service users, whereas this protection is not in the first instance available with non hybrid businesses. We consider it appropriate and important for users of payments systems for you to require non hybrid firms to safeguard funds in a similar manner to hybrid firms.

16. How should the competent authority approach the option to demand the legal separation of a payment institution's payments business from its non-payment activities?

A 16 Customers should have the maximum confidence that any funds in transit are safeguarded and the ability to require a legal separation of the payment service element of a business is an additional mechanism to achieve this. We agree that this may be a rather drastic response and that alternative safeguarding measures, properly implemented, may be more straight-forward. However we wonder whether it may be beneficial to take powers to require a legal separation, not with the intent that they will often be used, but rather as a backstop or reserve provision to ensure other measures are properly performed.

Chapter 4: Access to payment systems

21. Do you agree with the interpretation of the scope and aim of Article 28 on access to payment systems, and the schemes that will be affected in the UK? Are there other payment systems that may be affected?

A21 Ensuring that there is open access for payment service providers to access payment systems on the same terms is crucial for fostering a competitive environment for payments, subject to the essential safeguards to protect the risks and operational stability as allowed in Art 28. That said the disapplications allowed for and the examples you give appear reasonable and should not be anticompetitive. See also the penultimate paragraph of the General section above

Chapter 5: Titles III and IV conduct of business rules

23. Is any clarification needed in relation to any of the information requirements and how they relate to a given payment method or business model?

A 23 We would like to flag one element of the rule for the provision of information that we regard as inconsistent. In Article 48 (e) on the information to be provided to the payee after an individual framework transaction and in Article 39 (e) after a single payment in both cases is "the credit value date". Under Article 47 (e) for individual framework transactions the payer has to be given "the debit value date or the date of receipt of the payment order". By contrast in Article 38 (e) for single transactions the Payer has to be given "the date of receipt of the payment order." In the same way that the payee is particularly interested to know the credit value date we would have thought

that the payer needs to be informed of the debit value date for both single payments and framework payments. This is essential for reconciliation and checking charges and interest.

24. Do you agree with making Title III provisions compulsory when payment service providers deal with micro-enterprises, as for consumers?

A 24 We agree with your view that micro enterprises and consumers tend to share similar levels of information asymmetry vis-à-vis their payment service providers so that Title III provision should be compulsory for providers dealing with both groups.

27. Do you agree with the approach of not imposing additional requirements concerning the provision of information on paper, as provided for in Articles 47(3) and 48(3)?

A 27 Member States have the option to require that providers provide information on paper once a month free of charge. In the case of individuals and micro enterprises this would be valuable backstop for users, particularly those who do not have access to electronic communications. However given ever growing environmental concerns customers should be allowed to opt out of paper copies. For enterprises, where electronic communication can more readily be assumed and where volumes and costs could be higher, there seems little need to specify free paper copies.

28. Do you agree with the Government's intention of disapplying access to out of court procedures only where the payment service user is corporate and not a micro-enterprise?

A 28 As mentioned earlier we regard it a fair and reasonable to treat micro-enterprises as equivalent to consumers.

29. Do you agree with the approach of not exercising the derogation to forbid or limit the right of payees to request charges for payers' use of a given payment instrument?

A 29 If a business that is a payee suffers different charges for receipts via different payment methods it is only reasonable that it should, if it so wishes, charge its customers correspondingly. This is a commercial decision. As a by-product, through good transparency such as this, payment users will learn to use the payment mechanism that has the cost /benefit characteristics best suited to themselves. We therefore agree with your approach of not exercising the derogation allowed. However if this is to work to improve overall efficiency the extra charge should be limited to the direct costs only. It could otherwise become a major undisclosed income source for high volume, low transaction amount businesses

32. Do you agree with the approach of not legislating beyond the maximum execution times set by the Directive?

A 32 If there is a strong consumer demand for faster payment timecycles we would hope that normal competitive market mechanisms will come into play. Therefore we agree that there is no need for you to legislate for faster execution times than those set by the Directive. As in any oligopolistic industry, it is possible for the leaders not to respond to customer demands. However even if any competitor can technically meet the need, the pressure on them to offer a similar service level is high. Accordingly this is a matter that the competition authorities will need to review from time to time.

33. Do industry groups intend to produce codes of practice on PSD implementation for their members? To what extent can this be based on any existing trade association standards?

A 33 The ACT is a professional body of individuals and as such it would be inappropriate for us to produce codes of conduct for service providers. We do intend however to use the normal channels of communication available to us to keep our members informed as to developments in the payments area and in particular to changes from current practices.

Additional comment

The PSD value dating problem

Article 73 of the PSD includes provisions to outlaw charging by use of value dating, as stated as an intent in Preamble 45. The Directive Art 73.1 very clearly does this for the payee's end of transaction. However we have long had concerns that the drafting of the Directive is rather weak in achieving this objective at the payer's end of the transaction in that Art 73.2 merely says that the value date for the payment out must be no earlier than the date of the debit entry to the payer's account but without creating any restriction on when the payment service provider can make that debit. It should really be saying that the payer's bank should record the payment value date for the customer on the same value date as the bank itself has the payment leave its account with the payment settlement mechanism.

Rather than trying to redraft the Directive we think it would be helpful if the UK legislation could provide a clarification. For instance the legislation could replicate the overall purpose as taken from Preamble 45: "*The use of non-transparent pricing methods should not be allowed, since it is commonly accepted that those methods make it extremely difficult for users to establish the real price of the payment service. Specifically, the use of value dating to the disadvantage of the user should not be permitted.*

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The ACT is the international body for finance professionals working in treasury, risk and corporate finance. Through the ACT we come together as practitioners, technical experts and educators in a range of disciplines that underpin the financial security and prosperity of an organisation.

The ACT defines and promotes best practice in treasury and makes representations to government, regulators and standard setters.

We are also the world's leading examining body for treasury, providing benchmark qualifications and continuing development through training, conferences, publications, including *The Treasurer* magazine and the annual *Treasurer's Handbook*, and online.

Our 3,600 members work widely in companies of all sizes through industry, commerce professional service firms.

Further information is available on our website (below).

Our policy with regards to policy and technical matters is available at http://www.treasurers.org/technical/resources/manifestoMay2007.pdf .

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