EUROPEAN PAYMENTS COUNCIL
Towards our Single Payment Area

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CONSULTATION ON COMMON UNDERSTANDING OF THE OBLIGATIONS IMPOSED BY REGULATION (EC) 1781/2006 ON INFORMATION ON THE PAYER ACCOMPANYING TRANSFERS OF FUNDS

1. Introduction

The EPC would like to thank CESR, CEBS and CEIOPS for the opportunity to comment on the common understanding the three organisations intend to develop with regard to the obligations imposed by Regulation (EC)1781/2006 on information on the payer accompanying transfers of funds. The initiatives taken by CESR, CEBS and CEIOPS to consult the industry in the run up towards the consultation are appreciated. You will find the comments derived from the EPC member base below, starting with some general comments and followed by more specific comments directly referring to the consultation document.

2. General

2.1 Not enough emphasis on the responsibilities of the payer PSP

We find that the paper does not sufficiently recognize that the primary responsibility for providing the information on the payer lies with the PSP of the payer, whether it is located in the EU or any other country. Only if the PSP of the payer invariably sends complete information about the payer can the international requirements of FATF Special Recommendation VII be fulfilled and efficient payments processing be ensured.
There is also a need to clarify what steps should be taken by the responsible authorities – including those in countries outside the EU – against banks which do not comply with the international rules and are reported to the authorities pursuant to Article 9(2). The solution cannot be to impose yet more requirements on the banks at the end of the payment chain when the cause lies with the sending bank.

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2.2 De minimis threshold

Greater account should be taken of the EUR/USD1,000 de minimis threshold mentioned in recital 17 of the Regulation. We urge the competent authorities to publish a list of the countries which apply this threshold to outgoing payments, on what basis (reference to the relevant legal text transposing FATF SRVII) and whether its application is optional or mandatory. In addition, it should be made clear that incoming payments from these countries below the de minimis threshold are not subject to detection of missing information (see also our comments on paragraph 5.1)

2.3 The Common Understanding should be developed taking account of the high volume, highly automated environment that it applies to

We recognize and support the objectives of the Regulation to implement FATF Special Recommendation 7 intended to increase the transparency of electronic funds transfers, but it is important never to lose sight of the fact that it has to function in a high volume environment in which billions of euro's worth of electronic funds transfers are processed on a daily basis with a high level of automation. Consequently it is considered essential when reviewing the impact of the inward monitoring obligations placed on Payee PSPs under the Regulation that:

- They are practical, and recognize, for example, that when a PSP receives payments originating from another PSP it does not necessarily have a 'relationship' with that other PSP which can be simply terminated at will but such funds may be received through a payment system whose membership it does not control and/or be received from an intermediary PSP;
- Their interpretation is unambiguous, so that financial services Regulators in all Member States apply them consistently across the Community; in particular we are concerned to ensure that compliance with the Regulation is not conflated with compliance with financial sanctions or AML legislation, in respect of which PSPs may take varying commercial decisions on the extent to which they filter payments (as distinct from screening customers);
- The interest of innocent customers remains paramount; it is unacceptable if customers are disadvantaged by payment delays or failures to complete transactions because of disagreements between PSPs over the requirements of the Regulation;
- Consequently, the two-stage approach combining limited validation during processing with after the event checking tailored to the payee PSP is supported;
- It is regarded as very important to take account of the major differences between PSPs with regard to volume and business mix.

Finally, we would like to remark that the EPC is working on a common interpretation of how to use , in particular, the SWIFT standards in the context of the Regulation and would like to promote a uniform use of these standards so as to ensure maximum STP (Straight Through Processing) levels in handling payments transactions and to reduce the currently reported levels of "non-compliant" payments. Having said this, we do recognise that transactions carrying payer information in other fields than those promoted by the EPC, cannot be considered as non-compliant with the Regulation.

2.4 Status of the paper

It is our understanding, based on the hearing of 6 May that the Common Understanding is not to be seen as an extension of the Regulation adding additional obligations but rather as a clarification to support Regulators in monitoring the implementation of the Regulation. The EPC could support such an approach and would like to ask CESR, CEBS and CEIOPS to confirm this.

It has to be understood, however, that, even if the Common Understanding is for clarification purposes only, banks may have to make some adjustments to their systems applications if they initially had a different understanding of the Regulation's obligations. We ask Regulators therefore not to apply the Common Understanding too strictly for another 12 months after its finalisation.

3. Specific comments on the consultation document

Paragraph headers 3.1.2 and 3.1.3

To make it absolutely clear that PSPs in the EU have the choice to take any of the approaches described, we would ask that the word "if" is added at the start of each header.

Paragraphs 6 –8

- In paragraph 6 we would suggest you say 'may pass through the system' instead of 'will pass through the system'

- It is illogical and inconsistent to say in paragraph 7 both that 'PSPs are *encouraged*…' and 'PSPs *must* apply…'. There is in any case a danger in the term 'obvious meaningless information' since the assessment of information to determine that fact is a subjective one and potentially liable to misunderstandings arising from language or the use of permitted identifiers other than address. Also, we note that the term 'meaningless' is not used in the Regulation itself. While banks may well apply filters already at the time of processing, also as a choice of implementation to comply with other legislation, it should not become an obligation. We would ask to the replace the word "must" in the latter sentence with the phrase 'are encouraged to'.

- 'regularly failing' is another subjective term, the interpretation of which has the scope for unnecessarily heavy handed application by some PSPs to the detriment of customers and fruitless devotion of resource by PSPs to a cumbersome and time wasting paper-chase.

- In particular, we consider that paragraph 8 fails to acknowledge the potential distortion arising from situations where large PSPs act extensively as intermediaries and are simply passing on payments as they are required to do under Art. 12. Consequently, they risk being branded as regularly failing when they are not directly at fault.

Paragraph 9:
We would suggest the 'PSPs may become aware' instead of 'PSPs will become aware'.

Paragraph 13:
We find the formulation of paragraph 13 is misleading. Indeed, the present formulation could be interpreted as there being the expectation that the preferred course of action for PSPs to take is to reject transfers when becoming aware that information is incomplete when receiving the transfer. Considering the different practices and regulatory requirements around Europe (e.g. Directive 2007/64/EC art. 73.1), such interpretation would not be workable. Also, such a policy means that the PSP routinely subjects its own customers, who in the vast majority of cases will be completely blameless, to the delay, distress and personal and commercial disruption inherent in the automatic rejection of ostensibly non-compliant payments. Specifically, we would draw your attention to section 1 of the underlying FATF Interpretative Note to Special Recommendation VII, which makes it clear that the prime objective is traceability. We would advise to replace the word 'should' by the phrase 'should be encouraged to'.

Paragraph 16:
Payee is used though *payer* was probably meant.

Paragraphs 21
We would see the 7 working day time span between the receiving the payment and making an enquiry as a recommended, rather than a mandatory time span. We would consider that it should be possible to send a request for information even after these 7 days if, for example a post event sampling exercise shows the need for such request for information.

Paragraphs 22-24:
We suggest that incomplete information and delays in rectifying it are rarely likely of themselves to raise a suspicion of ML/TF. Moreover, PSPs generally apply their automated transaction monitoring resource for AML/CTF purposes to the whole of a customer's account activity and respond accordingly. Operationally, the inclusion of some form of suspicion assessment specifically within the post event sampling process for monitoring inward payment traffic to comply with Regulation 1781/2006 is not likely to be efficient, particularly within large PSPs processing high volumes of traffic. Whilst occasionally it may bring a case for concern to light, it will be the exception rather than the rule, and we recommend that the common position does not try to impose an obligation to assess suspicious character over and above that which already exists generally for AML under the requirements of the 3rd AML Directive and other legal obligations.

Paragraph 25
This paragraph is critical; the focus of the regulatory effort should be on ensuring that local Regulators in non-EU countries are working to ensure that PSPs regulated by them are sending complete information with payments. Inward monitoring is only a second line of defence.

Paragraph 26:
The various time deadlines suggested are considered to be unrealistic, especially when dealing with some developing countries or those in a state of civil unrest.

Q 1:
We have a strong preference for option B. We would consider option A as being too detailed and prescriptive to fit the different business models of the different PSPs. It also seems to go further than the obligations presently stipulated in the Regulation itself. In particular, while we do not object to individual PSPs implementing certain deadlines as part of their risk-based approach, we do consider the deadlines proposed as unrealistic.

Paragraph 33
The time deadlines suggested for the global 3 day follow-up is considered to be unrealistic, especially when dealing with some developing countries or those in a state of civil unrest. See comment under paragraph 26.

Q 2:
Whilst we would concur with paragraph 30 that "when the PSP chooses to hold the funds, its first action should normally be to ask for the complete information", subject to local law most PSPs would not see the option of holding the funds as one they would normally resort to other than in the case where they are seeking prior consent from the FIU to undertake a transaction. Incomplete information on a wire transfer would usually be a very tangential side-issue in such cases and would not in itself be the trigger for seeking consent. Consequently, they view the choice between Options A and B as a hypothetical matter, such cases would be managed on their individual merits. By default Option B would be our preference.

Paragraph 38:
We do not see any need for this section, as the situation it seeks to address is already embraced under 3.1.3 *The PSP chooses to execute the transfer.*

Q.3
We are still in the early stages of application of the Regulation. The regularity of failure is at present higher than we expect it to be in the longer term as a result of ongoing work by banks to improve the implementation of the Regulation (example: we do not know yet how the threshold possibility is applied in other FATF Member States). Taking this into consideration, we can at present not go further than to say that we broadly agree to the principles represented by criteria (a), (d) and (e). We advise however to allow PSPs to develop these further as part of the risk-based approach to be put in place.

Paragraph 44;
We strongly support the point made in this paragraph that failure to supply information should not be confused with suspicious activity and that, therefore, reporting failing PSPs is a totally separate reporting concept to that which relates to the filing of STRs.

Para 46:
We also strongly endorse the sentiment that disruption of commercial relationships with other PSPs is to be avoided if at all possible, and whilst PSPs do on occasions make their own commercial decision to terminate a relationship with a particular correspondent, they would rarely wish to do so purely for breaches of Regulation 1781/2006. Indeed, cases can arise where payments form only a small part of the overall relationship. We also repeat a comment made earlier in this response that a

PSP may not necessarily have a relationship as such with another PSP from whom it receives payments.

Q.4:

Consequently, we agree that a mechanism is required for the coordination of actions against failing PSPs to ensure that any sanctions are proportionate and properly and fully considered before being put into effect, since blacklisting any PSP is potentially very damaging to that firm's market standing and should only be considered as a last resort. The decision to terminate a relation is not an easy one, especially when there is a mix of different business being conducted with such a party. Particularly, where state controlled banks are involved, there may also be political and foreign policy considerations, which commercial banks are not in a position to judge. Any such blacklisting is we believe properly the responsibility of European and international Regulators, taking a view of a range of reports received, rather than individual PSPs. We agree that industry should be represented in the coordination process in whatever form it takes but industry should not be responsible for what may be considered a decision in the competitive arena. Such coordination mechanism should take into consideration that various PSPs will apply different filtering rules etc and might have different views on a particular situation and this might make a difficult debate

Paragraph 51.
To facilitate compliance with the understanding formulated in paragraph 51, the industry would request that the European Commission encourages the competent authorities to make available an overview of the different measures put in place in the different FATF Member States to implement FATF SRVII and of the different thresholds applied.

Section 7

The review of the common understanding should be conducted at the same time as the review of the Regulation.