

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CONSULTATION DOCUMENT

Consultation on Proposed Amendments to the Credit Institutions and Financial Institutions (Payment Accounts) Regulations (S.L. 371.18)

[MFSA REF: 07-2017]

22nd November 2017

Closing Date: 6th December 2017

Note: The documents circulated by the MFSA for the purpose of consultation are in draft form and comprise proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received from Licence Holders and other involved parties. It is important that persons involved in the consultation bear these considerations in mind.

Introduction

The aim of this consultation document is to present the proposed amendments to the Credit Institutions and Financial Institutions (Payment Accounts) Regulations (S.L. 371.18) (hereinafter referred to as the “PAR”) to the industry and all relevant stakeholders. The PAR transpose Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (hereinafter referred to as the “PAD”).

After discussions and meetings held with the industry and other stakeholders, the Malta Financial Services Authority is hereby proposing some amendments to the PAR in order to better align some of the provisions contained in the PAR to the PAD, while at the same time address some of the industry’s concerns.

Proposed Amendments

Entry into force of regulations 8, 10, 12 and 13 of the PAR

Article 29(2)(b) of the PAD requires Member States to apply the measures necessary to comply with Article 4(1) to (5), Article 5(1), (2) and (3), Article 6(1) and (2) and Article 7 of the PAD, by nine months after the entry into force of the delegated act referred to in Article 3(4) of the PAD.

Regulation 1(6) of the PAR has therefore been added in order to provide the Minister with the necessary enabling power to establish the exact date of the entry into force of regulations 8, 10, 12 and 13 of the PAR, which transpose the Articles of the PAD referred to in Article 29(2)(b) of the PAD.

Revision of the list of the most representative services linked to a payment account

Article 3(6) of the PAD requires Member States to, *inter alia*, update the final list of the most representative services linked to a payment account in accordance with Article 3(5) of the PAD and to ensure that payment service providers use the updated terms and definitions. Article 3(5) of the PAD requires Member States to, *inter alia*, publish the resulting final list of the most representative services linked to a payment account without delay and at the latest within three months after the delegated act referred to in Article 3(4) of the PAD enters into force.

Regulations 6(1) and (2) are therefore being amended in line with Article 3(6) of the PAD in order to require the competent authority to publish the updated list of the most representative services linked to a payment account at the latest within three months of the entry into force of the changes adopted by the European Commission to the regulatory technical standards setting out the EU standardised terminology.

Comparison websites

Article 7(1) of the PAD requires Member States to ensure that consumers have access, free of charge, to at least one website comparing fees charged by payment service providers for at least the services included in the final list referred to in Article 3(5) of the PAD at national level. In this regard, regulation 13(1) of the PAR requires the competent authority to provide such a comparison website. Article 7(2) of the PAD further provides Member States with the possibility to require comparison websites to include further comparative determinants relating to the level of service offered by the payment service provider. Accordingly, a new sub-regulation (2A) is being inserted in order to provide the competent authority with the possibility to include such further comparative determinants should the need arise.

In addition, in order to fulfil its obligations pursuant to regulation 13(1), (2) and (2A), the competent authority needs to be provided with the relevant information by payment service providers and accordingly, a new sub-regulation (2B) is being added in order to clarify the payment service providers' notification duties in this respect.

Regulation 13(3) is also being amended in order to clarify the obligations that private operators or other public authorities wishing to operate similar comparison websites need to adhere to in providing such comparison websites, as well as to provide the competent authority with the possibility to require any such private operators or other public authorities to include further comparative determinants relating to the level of service offered by payment service providers.

Genuine interest

The second subparagraph of Article 16(2) of the PAD provides Member States with the possibility to require consumers who wish to open a payment account with basic features in their territory to show a genuine interest in doing so. In this regard, the MFSA has revisited its position and is proposing the insertion of regulation 19(3A) in order to provide credit institutions with the possibility to require consumers to show a genuine interest when requesting a payment account with basic features. In order to ensure that such a provision is not used in a discriminatory manner, the Authority is also proposing the insertion of a new regulation 19(4A), which, in line with recital (35) of the PAD, requires credit institutions not to refuse to open a payment account with basic features on the basis of the consumers' financial circumstances, including their employment status, level of income, credit history or personal bankruptcy.

Overdraft facilities

Article 17(8) of the PAD provides Member States with the possibility to allow credit institutions to provide, upon the consumer's request, an overdraft facility in relation to a payment account with basic features. In this regard, the MFSA has revisited its position and is proposing the taking up of such an option, thereby allowing credit institutions to provide such a facility. Regulation 29 of the PAR is therefore being amended accordingly.

Article 17(8) of the PAD also provides Member States with the possibility to define a maximum amount and a maximum duration of any such overdraft facility. At this point in time, it is however deemed that in order to provide flexibility to credit institutions to determine the maximum amount and duration of any such facility in accordance with their business strategy, such an option should not be taken.

Associated fees

Article 18(1) of the PAD requires Member States to ensure that the services referred to in Article 17 of the PAD are offered by credit institutions free of charge or for a reasonable fee. In addition, Article 17(5) of the PAD further specifies that with respect to the services referred to in points (a), (b), (c) and (d)(ii) of Article 17(1) of the PAD, excluding payment transactions through a credit card, Member States are to ensure that credit institutions do not charge any fees beyond the reasonable fees, if any, referred to in Article 18, irrespective of the number of operations executed on the payment account.

In this regard, and following discussions with the industry, the MFSA decided to revisit regulation 30 of the PAR.

In particular, the amendment of regulation 30(1) is being proposed in order to remove the obligation on credit institutions to determine a minimum number of operations for which no fee shall be charged. As a result, the MFSA is therefore proposing not to take up the option provided to Member States in Article 17(6) of the PAD which provides Member States with the possibility to determine a minimum number of operations for which credit institutions can charge reasonable fees with respect to the services referred to in points (d)(i) and (d)(iii) of Article 17(1) of the PAD and in point (d)(ii) of Article 17(1) of the PAD only as regards payment transactions through a credit card. It is the MFSA's opinion that

this proposed change will allow credit institutions to offer a payment account with basic features without carrying out any substantial changes to their IT system.

The MFSA is also proposing to amend regulation 30(3) of the PAR in order to ensure that the reasonable fees which may be charged by credit institutions pursuant to regulation 30(1) and (2) of the PAR take into account at least the criteria referred to in Article 18(3) of the PAD. In this regard, it is to be noted that the possibility for credit institutions to impose “*a reasonable penalty for any error or omission in regard to the use and operation of a payment account with basic features*” as stipulated in regulation 30(3) of the PAR as promulgated by means of Legal Notice 411 of 2016, will still be available to credit institutions. In fact, regulation 30(2) of the PAR as amended, requires credit institutions to ensure that any fees charged for non-compliance with the consumer’s commitments laid down in the framework contract are reasonable.

Similarly, regulation 30(4) of the PAR, as promulgated by means of Legal Notice 411 of 2016, also provided credit institutions with the possibility to apply a reasonable fee to a consumer for any service set out in regulation 25(1), where the payment account with basic features is not denominated in Euro. The changes which are being proposed to the PAR by the MFSA will still allow credit institutions to charge such fees. In fact, regulation 26 of the PAR is being amended in order to clarify that payment accounts with basic features shall be offered at least in Euro and, at the sole discretion of the credit institutions, in the currency of any other Member State. Where credit institutions offer payment accounts with basic features denominated in a currency other than the Euro, such credit institutions will still be allowed to charge a reasonable fee in terms of regulation 30(1) of the PAR as amended.

In both such cases, that is with respect to any fees charged for non-compliance with the consumer’s commitments laid down in the framework contract, as well as with respect to any fees charged for services offered in relation to a payment account with basic features which is not denominated in Euro, credit institutions are required to ensure the reasonableness of such fees in accordance with regulation 30(3) of the PAR as amended.

Framework contracts and termination

The MFSA is proposing the deletion of point (vi) of regulation 31(2) of the PAR in order to mirror the conditions established in Article 19(2) of the PAD. In this regard, it is to be noted that in the event of failure by the consumer to abide by the terms and conditions of the payment account, credit institutions may, in terms of regulation 30(2) of the PAR as amended, charge reasonable fees.

In addition, it is also being proposed to amend point (b) of regulation 31(2) of the PAR in order to clarify that any additional limited and specific cases where a framework contract for a payment account with basic features may be unilaterally terminated by credit institutions as may be further prescribed by the Minister shall, in terms of Article 19(3) of the PAD, be aimed at avoiding abuses by customers of their right to access a payment account with basic features.

Monitoring and enforcement

The Authority’s obligation in regulation 34 of the PAR to maintain arrangements for the purpose of enabling it to determine whether payment service providers are compliant with the PAR is inconsistent with the terminology which is usually used in local legislation. Furthermore, regulation 33(1) as re-numbered, already vests the competent authority with the full responsibility for the application and enforcement of the PAR. In addition, the PAR, the Banking Act (Cap. 371), the Financial Institutions Act (Cap. 376) and the Malta Financial Services Authority Act (Cap. 330) also contain various powers which can be utilised by the competent authority in order to ensure compliance with the PAR.

Accordingly, the Authority is proposing the deletion of regulation 34 of the PAR.

Power to issue directives: procedure

The power to issue directives as provided in regulation 38 of the PAR, as further specified in regulation 39(1) of the PAR, also includes the power to issue directives with immediate effect. Accordingly, the Authority is proposing to amend regulation 39(2) of the PAR in order to clarify the text.

Administrative penalties

Article 26 of the PAD states, *inter alia*, that sanctions imposed in relation to infringements of national legislation transposing the PAD shall be effective, proportionate and dissuasive. In this regard, a new regulation 41(1A) is being inserted in order to better reflect the wording of the PAD.

Public notice

Article 26(2) of the PAD requires Member States to provide competent authorities with the possibility to disclose to the public any administrative sanction imposed for infringements of the measures adopted in the transposition of the PAD, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Accordingly, regulations 42(1) and 42(3) are being amended in order to better reflect the wording of the PAD, while ensuring that in cases where an appeal has been filed, the competent authority also publishes information on the status of the appeal and the outcome thereof.

In addition, further to such proposed amendments, a new regulation 42(1A) is being inserted in order to reproduce the text of regulation 42(3) as originally promulgated by means of Legal Notice 411 of 2016.

Evaluation

Article 27(1) of the PAD requires Member States to provide to the European Commission the information listed thereunder. In this regard, in order to allow the competent authority to fulfil its obligations pursuant to regulation 45(1) of the PAR, a new regulation 45(2) is being inserted requiring payment services providers to provide to the competent authority any information which it may reasonably require in order to fulfil such obligations.

Content of the fee information document

Whereas paragraph 2(3) of Schedule 1 of the PAR as originally promulgated by means of Legal Notice 411 of 2016 provided credit institutions with an option as to whether to include in the fee information document a list of the penalties which may be incurred by the consumer for the use of a payment account, paragraph 2(b) of Schedule 2 of the PAR makes such a requirement mandatory in relation to the statement of fees. In this regard, it is the Authority's opinion that payment service providers should also be required to include in the fee information document the penalties which could be incurred for the use of a payment account. Accordingly, the Authority is proposing the amendment of paragraph 2(c) of Schedule 1 of the PAR as re-numbered in order to convert the said option into a mandatory requirement.

Presentational format of the fee information document and the statement of fees

Paragraph 4(e) of Schedule 1 of the PAR and paragraph 4(iii) of Schedule 2 of the PAR as originally promulgated by means of Legal Notice 411 of 2016, require the fee information document and the statement of fees to be "*written in Maltese and English or, if agreed by the consumer and payment service provider, in another language*".

Following discussions with the industry and stakeholders, the Authority is proposing to amend these provisions in order to require the fee information document and the statement of fees to be "*written in English and, if requested by the consumer, in Maltese or, in any other language agreed upon by the consumer and the payment service provider*".

Furthermore, the Authority is proposing to delete regulation 9(3) of the PAR since the contents thereof are replicated in paragraph 5 of Schedule 1 of the PAR.

Presentational format of the consumer's authorisation to perform the switching service

Similarly, paragraph 1(c) of Schedule 3 of the PAR is also being amended in order to require the consumer's authorisation to perform the switching service to be "*drawn up in English and, if requested by the consumer, in Maltese or, in any other language agreed upon by the consumer and the payment service provider.*"

Other

Other amendments to the text of the PAR are also being proposed in order to further align the provisions of the PAR with the relevant provisions of the PAD, to further clarify the text, as well as to remove any potential inconsistencies. In this regard, a number of definitions have also been amended and/or added.

Way Forward

Any feedback on the proposed amendments should reach the MFSA by not later than the 6th of December of 2017. Please send your responses by e-mail to the policy team within the Banking Supervision Unit at MFSA on bsupolicy@mfsa.com.mt. Any queries for clarification in respect of the draft amendments should also be addressed to the provided email address.

Communications Unit
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