

Banking & Finance Law

Lecture Title: Depositor Compensation & Certain Consumer Related Legislation

Lecturers: Dr. Michael Buhagiar
Dr. Andrei Vella

Date: 17 April 2023



CAMILLERI PREZIOSI
ADVOCATES

Introduction to DCS

- The DCS is regulated by the Depositor Compensation Scheme Regulations (legal notice 383 of 2015, as amended) (the “DCS Regulations”), which are regulations issued under the Banking Act (Cap 371).
- Based on Directive 2014/49/EU.
- The provisions of the Depositor Compensation Scheme are to some extent mirrored in the Investor Compensation Scheme (legal notice 368 of 2003, as amended).



What does it do and how does it work?

- The main function of the Depositor Compensation Scheme and the Investor Compensation Scheme respectively is that of maintaining a fund or funds out of which payments are made to depositors / investors in contexts where there is a likelihood that the deposits / investments may be lost owing to the bank's / investment firm's financial distress.
- There are situations when such funds are paid out to depositors, and there are categories to determine which deposits are eligible for restitution in terms of the DCS Regulations. It can only pay compensation if a bank is unable to meet its obligations towards depositors or has otherwise suspended payment



Definition of 'Depositor' and 'Deposits'

- The term "depositor" refers to the holder or, in the case of a joint account, each of the holders, of a deposit; and, in the case of a deceased depositor, the successor in title of such depositor such as an heir or a legatee of a deposit.
- The term "deposit" means a credit balance, including, as the case may be, any interest accrued thereon, which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution is required to repay under the legal and contractual conditions applicable, including a fixed-term deposit and a savings deposit.



- BUT excluding a credit balance where:

- (a) its existence can only be proven by a financial instrument as defined in Article 4(17) of Directive 2004/39/EC (e.g. transferable securities, options, futures, swaps etc), unless it is a savings product which is evidenced by a certificate of deposit made out to a named person and which existed in Malta on 2 July 2014; or
- (b) its principal is not repayable at par (e.g. Structured capital-at-risk products which are linked to the performance of underlying assets); or
- (c) its principal is only repayable at par under a particular guarantee or agreement provided by the credit institution or a third party.



Eligibility of deposits

In terms of regulation 9(1), a deposit is an eligible for restitution in terms of the DCS Regulation deposit only if:

- (i) it is held with a member: (a) in Malta; or (b) in that member's branch which is located in another Member State; and
- (ii) the deposit does not fall within any of the following categories of funds held by credit institutions licensed to operate in Malta: (a) Deposits made by other credit institutions on their own behalf and for their own account; (b) own funds of the bank; (c) deposits arising out of transactions in connection with which there has been a criminal conviction for money laundering; (d) deposits by financial institutions; (e) deposits by investment firms; (f) deposits the holder of which has never been identified; (g) deposits by insurance undertakings and by reinsurance undertakings; (h) deposits by collective investment undertakings; (i) deposits by pensions and retirement funds; (j) deposits by public authorities; (k) debt securities issued by a credit institution and liabilities arising out of own acceptances and promissory notes; (l) deposits held with a member in a branch of that member which is located in a non-Member State; (m) deposits held in a branch in Malta by a bank established outside the EEA area.

When the scheme is triggered

- The Scheme triggers when the “eligible deposit” defined as aforesaid becomes an “unavailable deposit”. The “eligible deposit” must be held with a “member” of the Depositor Compensation Scheme, that is a credit institution participating in the Depositor Compensation Scheme.
- The main players as far as the Investor Compensation Scheme Regulations are concerned are not banks / credit institutions, but investment licence holders in possession of a Category 2 or Category 3 licence in terms of the Investment Services Act (Licence and Other Fees) (subsidiary legislation 370.03).



When the scheme is triggered (cont'd)

- In terms of regulation 7(1) of the DCS Regulations, a credit institution which is licensed in Malta under the Banking Act, other than a branch established in Malta by a credit institution which has its head office outside the European Union, is obliged to participate in the Scheme.
- An “unavailable deposit” is a deposit that is due and payable but that has not been paid by a member under the legal or contractual conditions applicable thereto, where either:
 - (a) the competent authority has determined that in its view the member concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the member has no current prospect of being able to do so; or
 - (b) a judicial authority has made a ruling for reasons which are directly related to the member’s financial circumstances and which has the effect of suspending the rights of depositors to make claims against it.



Amount covered by the DCS

- The maximum compensation sum payable for the aggregate deposits of each depositor is EUR 100,000. Additional compensation – of up to EUR 500,000 – may be awarded where the sum payable is on account of a temporary high balance.
- In order to qualify as a temporary high balance, a part of an eligible deposit in excess of EUR 100,000 must meet any one of the following additional criteria:
 - (a) it comprises: (i) monies deposited in preparation for the purchase of a private residential property by the depositor; or (ii) monies which represent the proceeds of sale of a private residential property of the depositor; or
 - (b) it comprises sums paid to the depositor in respect of: (i) a separation, divorce or dissolution of their civil union; or (ii) benefits payable on retirement; or (iii) a claim for compensation for unfair dismissal; or (iv) a claim for compensation for redundancy; or (v) benefits payable for death or bodily injury; or (vi) a claim for compensation for wrongful conviction



Claim Process and Payment

- The Scheme shall pay compensation to a depositor in respect of a temporary high balance if it is satisfied that there is a sufficient link between an event giving rise to a temporary high balance and the part of the eligible deposit in excess of EUR 100,000.
- There is one critical difference between the EUR 100,000 and the EUR 500,000 temporary high balance compensation. Whereas the EUR 100,000 is to a great extent automatic, the EUR 500,000 compensation is to be based on a claim which the relevant depositor must make with the Scheme. The claim must be made by written application, and must be supported by evidence supporting the claim that all or part of the eligible deposit in excess of EUR 100,000 qualifies as a temporary high balance.



Claim Process and Payment

- The application required in connection with a temporary high balance claim may be downloaded from the website of the depositor compensation scheme.
- The application requires the claimant to confirm the circumstances out of which the claim is arising and sets out the supporting documentation that must be submitted depending on the circumstances giving rise to the claim.
- By way of example:
 - (a) for monies deposited in preparation for the purchase of a property or which represent the proceeds of sale of a residential property, the claimant must submit a certified true copy of the promise of sale or deed of transfer.
 - (b) for sums which were paid to the depositor in respect of a separation or divorce, the claimant must submit a certified true copy of the court judgement and the deed of separation or divorce.
 - (c) For sums that were paid to the depositor in respect of a claim for compensation for redundancy, the claimant must submit a certified true copy of the court judgement and employment statements.
- The list provided is not exhaustive and depends on the depositor's individual circumstances.



Claim Process and Payment (cont'd)

- Within the context of the EUR 100,000 compensation, the process is more automated. As such, within five working days after first becoming satisfied that a member has failed to repay deposits which are due and payable, the MFSA is to make a determination with respect to whether the deposits are indeed “unavailable deposits”.
- Upon the MFSA making such a determination, it shall, without delay, inform the scheme of such a determination.



Claim Process and Payment (cont'd)

- The Scheme, upon being informed by the competent authority of such determination or ruling, it is to publish a notice on its website and in at least two local newspapers, informing depositors of the member concerned:
 - (a) of such determination or ruling,
 - (b) of the manner in which the compensation to the depositors shall be processed,
 - (c) that depositors may be entitled to additional compensation if all or part of the eligible deposit in excess of EUR 100,000 qualifies as a temporary high balance;
 - (d) that in order to claim such additional compensation, a depositor must provide the Scheme with a written application and evidence supporting the depositor's claim all or part of the eligible deposit in excess of EUR 100,000 qualifies as a temporary high balance;
 - (e) that a depositor may make more than one claim if there are multiple events giving rise to temporary high balances; and
 - (f) the date by which such written application and supporting evidence should be submitted to the Scheme.
- that



Claim Process and Payment (cont'd)

Media Release

To: Nemea Bank plc depositors

Compensation to the depositors of Nemea Bank plc ("Bank") is being processed following a determination by the Malta Financial Services Authority ("MFSA") on the 30 March 2017, regarding the inability for the time being of the said Bank to repay deposits placed by its depositors. The MFSA has made this determination in terms of Article 8(1) of Legal Notice 383 of 2015.

On the basis of information disclosed by the Bank to the Malta Depositor Compensation Scheme ("Scheme") pursuant to regulation 20 of the Depositor Compensation Scheme Regulations, the Scheme is proceeding to process the payment of compensation to depositors who have held deposit / s with the Bank which are eligible to compensation from the Scheme. For this reason it is not necessary for depositors to submit a claim to the Scheme.

The protection provided by the Scheme is subject to a maximum compensation of €100,000 for the aggregate deposits of each depositor.

In addition, the maximum compensation sum payable for a temporary high balance is EUR 500,000. These limits are equivalent to those mandated by Directive 2014/49/EU on deposit guarantee schemes.

Such protection runs for six months from the date when the amount is credited or becomes legally transferrable, whichever is the later date. Eligibility for such higher protection is dependent on additional criteria as outlined on the Scheme's website and the filing of a written claim together with such other information that the Scheme considers relevant. Further information about the compensation process relating to the Bank is available online at www.compensationschemes.org.mt. Further contact details are available at this link.

Published date: 30 March 2017



Claim Process and Payment (cont'd)

- A depositor may make more than one claim if there are multiple events giving rise to temporary high balances. In any event, the maximum amount one may claim is capped at EUR 500,000.
- The protection for temporary high balances runs for a period of six months from the later of: (a) the first date on which a temporary high balance is credited to a depositor's account, or to another account on a person's behalf; and (b) the first date on which the temporary high balance becomes legally transferable to the depositor.



Claim Process and Payment (cont'd)

- The Scheme shall, within three months of the compensation date, pay to the depositor a sum representing the amount due to the depositor in respect of the temporary high balance unless the Scheme requires additional evidence or a deferred payment is agreed to with the relevant depositor.
- In normal course of events, the Scheme pays compensation in respect of eligible deposits without a request to the Scheme being necessary. The applicable time period for payment is reckoned as ten working days from the compensation date. This time frame may however be extended where for instance: (a) the deposit is not an active account; or (b) the amount to be repaid is part of a temporary high balance.



Claim Process and Payment (cont'd)

- A non-active account is defined as follows:
 - (a) it is uncertain whether a person is entitled to receive compensation, such as when:
 - (i) the account holder is deceased;
 - (ii) the deposit is a pledged account;
 - (iii) the deposit is held by a minor; or
 - (iv) the deposit is subject to usufruct or similar rights,
 - (b) the deposit is subject to legal dispute;
 - (c) the deposit is subject to restrictive measures imposed by national governments or international bodies;
 - (d) the depositor has been charged with an offence arising out of or in relation to money laundering;
 - (e) the deposit is a dormant account.
- In so far as compensation under the Investor Compensation Scheme is concerned, the total amount of compensation that may be paid out to an investor is the lesser of 90% in respect of all claims which have been made by such investor, or up to EURO 20,000.



Calculating the Compensation

- Compensation is calculated by reference to eligible deposits held on the compensation date.
- The EUR 100,000 limit applies to the aggregate eligible deposits placed by a depositor with the same member, irrespective of the number of accounts, the currency, or the location within the EEA. Additionally, any compensation payable by the Scheme is to be calculated on the amounts credited to a depositor's accounts and on any interest which has accrued until, but has not been credited on the compensation date.



Calculating the Compensation

- **Joint Accounts:** The share of each depositor of a joint account shall be considered separately in calculating the EUR 100,000 limit. In the absence of contrary provision, the joint account shall be divided equally among the depositors. Deposits in an account to which two or more persons are entitled as members of a business partnership, association, or grouping of a similar nature, without legal personality, shall be aggregated and treated as if made by a single depositor for the purpose of calculating the EUR 100,000 limit.
- Liabilities of the depositor due to the member shall not be taken into account when calculating the repayable amount.



Consequence of Compensation Process

- The Scheme shall, upon paying compensation under these regulations, immediately and automatically be subrogated to all the rights of the depositor, up to the amount of the compensation paid, as against the member and, or any third party in respect of or arising out of the deposits being unavailable to the depositor.
- Depositors whose deposits are not repaid or acknowledged by the Scheme within the aforementioned time-limits automatically forfeit their right to claim repayment of their deposit after the lapse of a peremptory term of two years from the compensation date.
- Any depositor who is aggrieved by a decision of the Scheme in his regard may request the Scheme to reconsider its decision. The Scheme shall within two months from such request provide the said depositor with a reasoned decision. The foregoing is without prejudice to the right of a depositor to bring forward any claim he may have against the Scheme before a competent court or tribunal of civil jurisdiction.



Who administers the scheme?

- The Scheme is created in terms of the DCS Regulations. The Investor Compensation Scheme is in turn created in terms of the ICS Regulations.
- Further to such regulations, the Scheme is constituted as a body corporate having a distinct legal personality and is capable, subject to the provisions of the Banking Act and of these regulations, of entering into contracts of borrowing or otherwise incurring indebtedness for the purposes of its functions, of acquiring, holding and disposing of any kind of property for the purposes of its functions, of suing or being sued and of doing all such things and entering into all such transactions as are incidental or conducive to the exercise or performance of its functions.
- The Scheme is in turn administered by a Management Committee which is appointed by the MFSA. The regulations prescribing the composition of the Management Committee are common both for the Depositor Compensation Scheme and the Investor Compensation Scheme. The Scheme shares a common Management Committee with the Investor Compensation Scheme



Who administers the scheme?

- In terms of regulation 5(1) of the Investor Compensation Scheme Regulations, this Committee is to be made up of a chairperson and six other members. Such appointees are generally in terms of law: a person representing the MFSA; a person representing the Central Bank of Malta; a person representing investment firms, a person representing the banks, a person appointed by both the banks and the investment firms, and a person who represents the customers.
- The legal and judicial representation of the Scheme vests in the chairperson of the Management Committee.



How is it funded?

- Funding of the Depositor Compensation Scheme (unless deriving from borrowing) is based on Compensation Contribution and on Management Expenses Contribution.
- The Scheme may require payments on a yearly basis, though if the available financial means of the Scheme are insufficient to repay depositors when deposits become unavailable, the Scheme is to require members to pay an extraordinary Compensation Contribution not exceeding 0.5% of their covered deposits per financial year. The Scheme may in exceptional circumstances and with the consent of the competent authority require higher contributions.
- Funding of the Investor Compensation Scheme may derive from the following activities: (a) contributions levied from participants of the Scheme by the Management Committee; (b) money paid as administrative fees by all participants, as may be prescribed; (c) money received as income from the investment of the assets of the fund; (d) money borrowed by the Management Committee for the purposes of the Scheme; (e) money received by the Management Committee on any insurance policy it takes out; and (f) any other money required to be paid in to the fund or funds, received or recovered by the Management Committee for the purposes of the Scheme.



CREDIT AGREEMENTS FOR CONSUMERS RELATING TO RESIDENTIAL IMMOVABLE PROPERTY REGULATIONS



Introduction: Mortgage Credit Directive

- Published in the EU's Official Journal on 28th February 2014; entered into force on the 20th March 2014; became applicable in all EU Member States with effect from 21st March 2016.
- Step towards an EU wide mortgage credit market having a high level of consumer protection: consumers who take out a loan which relates to residential immovable property have adequate information and are protected against relevant risks involved.
- Minimum harmonization directive, but Member States may not diverge from the standard pre-contractual information set out in the European Standardised Information Sheet ("ESIS") and the EU standard for the calculation of the annual percentage rate of charge ("APRC").



Introduction: Maltese Regulations

- The Mortgage Credit Directive has been transposed into Maltese law by virtue of Credit Agreements for Consumers relating to Residential Immovable Property Regulations (S.L. 378.10).
- Establish a common framework for certain aspects of laws, regulations and administrative provisions concerning credit agreements
- Obligation for lenders to carry out a creditworthiness assessment before granting credit
- Guaranteed period of reflection / right of withdrawal for borrowers
- Certain prudential and supervisory requirements: the establishment and supervision of credit intermediaries
- Establish business conduct principles
- MFSA and DG (Consumer Affairs): competent authorities
- Malta as home Member State of the Bank



Application and scope

- The Regulations apply to:
 - (a) Credit agreements which are secured by a hypothec or privilege or residential immovable property, or secured by a right related to residential immovable property; and
 - (b) Credit agreements, the purpose of which is to acquire or retain property rights in land or retain property rights in land or in an existing or projected building.



Application and scope

- The Regulations do not apply to:

(a) credit agreements where credit is granted by employer to employees, free of interest and at lower APRC and not offered to general public;

(b) credit agreements where credit is granted free of interest and having no charges save for recovery costs directly related to the security of the credit;

(c) overdraft facility with credit repayable within one month;

(d) credit agreements which are the outcome of a settlement reached in court or before any other statutory authority; and

(e) credit agreements which relate to the deferred payment, free of charge, of an existing debt and which do not fall within the scope of credit agreements which are secured by a hypothec or privilege or residential immovable property, or secured by a right related to residential immovable property;

(f) Equity release credit agreements that satisfy certain conditions as specified in the Regulations.



Conduct of Business

- When providing credit to consumers, including the provision of ancillary or advisory services or when executing a credit agreement, a bank is to:
 - (a) act fairly, honestly, transparently and professionally; and
 - (b) take into account the rights and interests of consumers.

- Remuneration policies of staff is to be appropriate to the size, internal organisation, nature, scope and complexity of a bank's activities and should:
 - (a) promote sound and effective risk management and not encourage excessive risk taking;
 - (b) be in line with the bank's business strategy, objectives, values, long term interests and avoid conflicts of interests.



Knowledge and competence

- Staff to maintain an appropriate level of knowledge and competence in relation to the manufacturing, the offering or granting of credit agreements, the carrying out of credit intermediation activities or the provision of advisory services.
- MFSA establishes minimum knowledge and competence requirements in accordance with the principles set out in the Third Schedule to the Regulations.
- In the event that a bank were to provide its services within the territory of one or more other Member States through the establishment of a branch, the authority responsible for establishing the minimum knowledge and competence requirements applicable to the staff of such branch shall be the European regulatory authority of the host Member State.



Obligation to provide pre contractual information

- A Bank must provide the consumer with the personalized information needed to compare the credits available on the market, to assess their implications and to make an informed decision on whether to conclude a credit agreement:
 - (a) Without undue delay after the consumer has given the necessary information on his needs, financial situation and preferences;
 - (b) In good time before the consumer is bound by any credit agreement or offer; and
 - (c) On paper or on another durable medium
- Provided by means of ESIS as set out in the First Schedule of the Regulations
- Consumer entitled to a full seven day period of reflection before the conclusion of the credit agreement. Such period:
 - (a) is binding on a bank for the duration of the reflection period;
 - (b) should allow that the consumer may accept the offer at any time during the reflection period



Adequate explanations

- Banks are to provide adequate explanations to the consumer on the proposed credit agreement and any ancillary services, in order to place the consumer in a position enabling him to assess whether the proposed credit agreement and ancillary services are adapted and suited to his needs and financial situation.
- Such explanations shall, where applicable, include in particular:
 - (a) An explanation of the pre contractual information;
 - (b) The essential characteristics of the product proposed;
 - (c) The special effects which the products proposed may have on the consumer, including the consequences of default in payment by the consumer; and
 - (d) Where ancillary services are bundled with a credit agreement, whether each component of the bundle can be terminated separately and the implications for the consumer of doing so.
- The Director General (Consumer Affairs) is empowered to adapt the manner by which and the extent to which the explanations referred to above are given, as well as by whom it is given, to the circumstances in which the credit agreement is offered, the person to whom it is offered and the nature of the credit offered.



Content of Pre contractual information

- Content of precontractual information: minimum requirements set out in regulation 8 and include:
 - (a) An indicative example of the total amount of credit, the total cost of credit to the consumer, the total amount payable by the consumer and the APRC;
 - (b) A description of the conditions directly related to early repayment;
 - (c) The types of available borrowing rates, the conditions governing the application of such rates and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate.

- Pre contractual information to be made available at all times:
 - (a) in clear and comprehensible language;
 - (b) on paper or on another durable medium or in electronic form, and
 - (c) as much as possible, in a plain and intelligible language which can be easily understood by the consumer



Creditworthiness Assessment

- Before concluding a credit agreement: thorough assessment of the consumer's creditworthiness, taking appropriate account of factors which are relevant to verifying the prospect of the consumer meeting his obligations under the credit agreement.
- Obligation is aimed at making creditors accountable and to prevent them from granting loans to consumers who are not creditworthy, while protecting borrowers from the risk of over indebtedness and insolvency (CA Consumer Finance SA v Ingrid Bakkaus and others (C 449/13), Michel Schyns v Belfius Banque SA (C 58/18)).
- Banks should establish, document and maintain the procedures and information on which such assessment is based.
- The assessment of creditworthiness shall not rely predominantly on the value of the residential immovable property exceeding the amount of the credit or on the assumption that the residential immovable property will increase in value, unless the purpose of the credit agreement is to construct or renovate the residential immovable property.
- Once a credit agreement is concluded with a consumer: banks are prohibited from subsequently cancelling or altering the credit agreement to the detriment of the consumer on the grounds that the assessment of creditworthiness was incorrectly conducted, unless it is demonstrated that the consumer knowingly withheld or falsified the information provided.



Creditworthiness Assessment (cont'd)

- Banks shall only make the credit available to the consumer where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement.
- Before any significant increase in the total amount of credit is granted to the consumer after the conclusion of the credit agreement, and unless such additional credit was envisaged and included in the original creditworthiness assessment, banks shall re-assess the consumer's creditworthiness on the basis of updated information.
- In terms of regulation 10 of the Regulations, where the assessment of the consumer's creditworthiness results in a negative prospect for his ability to repay the credit over the lifetime of the credit agreement, the bank shall refuse to provide such credit. When the application for credit is so rejected, the bank is to inform the consumer without delay and free of charge of the rejection, of the reasons for such rejection and, where applicable, that the decision is based on the automated processing of data.



Creditworthiness Assessment (cont'd)

- Where the rejection of an application for credit is based on the result of the database consultation, the Bank shall inform the consumer without delay and free of charge of the result of such consultation and of the particulars of the database consulted, including the name of the database, the name of its controller, and the consumer's right to access and where necessary, his right to rectify his data in the database.
- A bank shall not be required to give the consumer such information if the information to be provided is prohibited by any other law, or is contrary to Maltese public policy or public security.
- Where the application is rejected on the basis of an automated decision or a decision based on methods such as automated credit scoring, the Bank shall inform the consumer without delay and free of charge. The bank is to explain the logic involved in the automated decision to the consumer, who shall have the opportunity to request for the decision to be reviewed manually.



Creditworthiness Assessment (cont'd)

- In the event that the parties to a credit agreement agree to change the total amount of credit after the conclusion of the credit agreement, the bank shall:
 - (a) Update the financial information at its disposal concerning the consumer; and
 - (b) Re-assess the consumer's creditworthiness, before the total amount of credit is significantly increased.



Creditworthiness Assessment (cont'd)

- The assessment of creditworthiness shall be carried out on the basis of information on the consumer's income and expenses and other financial and economic circumstances, which is necessary, sufficient and proportionate.
- This information shall be obtained by the bank from relevant internal or external sources, including the consumer and including information provided to any credit intermediary during the credit application process.
- The information shall be:
 - (a) appropriately verified, including, where necessary, through reference to independently verifiable documentation;
 - (b) up to date at that moment in time; and
 - (c) on reasonable assumptions as to the consumer's situation over the term of the proposed credit agreement.
- The Regulations do not provide for an exhaustive list of information to be provided, but provide banks with a margin of discretion for the purposes of determining whether or not the information at its disposal is sufficient to demonstrate the consumer's creditworthiness and whether it must check that information against other evidence.



Creditworthiness Assessment (cont'd)

- Banks are to specify in a clear and straightforward way, at the pre-contractual phase, the necessary information and independently verifiable evidence which the consumer needs to provide and the timeframe within which the consumer needs to provide such information.
- The request for information shall be proportionate and limited to what is necessary to conduct a proper creditworthiness assessment. Where necessary to enable the creditworthiness assessment, the Bank may seek clarification on the information received in response to that request.
- A bank is to warn the consumer that, where it is unable to carry out a creditworthiness assessment because the consumer chooses not to provide the information or verification necessary for such assessment, the credit cannot be granted. Such warning may be provided in a standardised format.



Creditworthiness Assessment (cont'd)

- Without prejudice to the provisions of the EU GDPR, personal data obtained from a consumer or any other person in connection with the conclusion and management of any credit agreement may only be processed for the purpose of assessing the consumer's creditworthiness or any such other person and their ability to repay in accordance with the Regulations.
- In connection with property valuations, the Bank is to ensure that it uses the standards established by the Director General (Consumer Affairs) relating to the valuation of residential property for the purpose of credit agreements, when it carries out a property valuation or, where such valuation is carried out by a third party, it shall take reasonable steps to ensure that those standards are applied.



Rights of the consumer

- The consumer is entitled to receive, free of charge, a copy of the draft credit agreement, unless, at the time of the consumer's request, the bank is unwilling to proceed with the conclusion of the credit agreement.
- Furthermore, the consumer is entitled to receive from the relevant notary public, a copy of the public deed of loan, at his request, immediately upon signing thereof, and in all instances, a copy of the public deed of loan duly registered at the Public Registry within 10 days from such registration.



Content of the Credit Agreement

To be drawn up in writing or on a durable medium, and shall specify as much as possible, in a plain and intelligible language that can be easily understood by the consumer, specific minimum information, namely:

- (a) The purposes for which the credit may be used;
- (b) The forms of security, including, where applicable, the possibility for it to be located in a different Member State;
- (c) A list of related cost elements, such as administrative costs, insurance cost, legal costs, and where applicable, the costs of intermediaries;
- (d) The possible duration of the credit agreement;
- (e) An indication of the currency or currencies in which the credit is available, including an explanation of the implications for the consumer where the credit is denominated in a foreign currency;



Content of the Credit Agreement (Cont'd)

(f) The types of available borrowing rates, the conditions governing the application of such rates and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rates;

(g) An indicative example of the total amount of credit, the total cost of credit to the consumer, the total amount payable by the consumer and the APRC;

(h) An indication of possible further costs, not included in the total cost of credit to the consumer, to be paid in connection with the credit agreement;

(i) Where applicable, a clear and concise statement that compliance with the terms and conditions of the credit agreement do not guarantee repayment of the total amount of credit under the credit agreement;



Content of the Credit Agreement (Cont'd)

(j) The identities and geographical addresses of the contracting parties as well as, if applicable, the identity and geographical address of the credit intermediary involved;

(k) The APRC and the total amount payable by the consumer, calculated at the time the credit agreement is concluded. All the assumptions used in calculating the APRC shall be mentioned;

(l) The right of the consumer to receive, on request and free of charge, at any time throughout the duration of the credit agreement, a statement of account in the form of an amortisation table. This shall:

(i) Indicate the payments owing and the periods and conditions relating to the payment of such amounts;

(ii) Contain a breakdown of each repayment, showing capital amortisation, the interest calculated on the basis of the borrowing rate and, where applicable, any additional costs;

(iii) Where the interest is not fixed or the additional costs may be changed under the credit agreement, it shall indicate clearly and concisely that the data contained in the table will remain valid only until such time as the borrowing rate or the additional costs are changed in accordance with the credit agreement;



Content of the Credit Agreement (Cont'd)

(m) If charges and interest are to be paid without capital amortisation, a statement showing the periods and conditions for the payment of the interest and of any associated recurrent and non-recurrent charges;

(n) The interest rate applicable in the case of late payments, as applicable as the time of the conclusion of the credit agreement and the arrangement for its adjustment and, where applicable, any charges payable for default;

(o) The procedure to be followed in exercising the right of termination of the credit agreement;



Content of the Credit Agreement (Cont'd)

(p) Information concerning the right resulting under regulation 16 of the Regulations and the conditions attached to that right (early repayment);

(q) Whether or not there is an out-of-court procedure for the consumer to make a complaint, the redress mechanism available and the mechanisms for having access to it; and

(r) Where applicable, other contractual terms and conditions.



Content of the Credit Agreement (Cont'd)

- Should there be any changes to the borrowing rate, the a bank is to inform the consumer of any such change, on paper or another durable medium, before the change takes effect. Such information shall state, as a minimum:
 - (a) the amount of the payments to be made after the new borrowing rate takes effect; and
 - (b) In cases where the number or frequency of the payments changes, provide the consumer with particulars of such payment changes.
- Where changes in the borrowing rate are determined by way of auction on the capital markets and it is therefore impossible for the bank to inform the consumer of any change before the change takes effect, the bank shall, in good time before the auction, inform the consumer on paper or on another durable medium of the upcoming procedure and provide an indication of how the borrowing rate could be affected.

Content of the Credit Agreement (Cont'd)

- The parties to the credit agreement may agree that:
 - (a) where the change in the borrowing rate is correlated with a change in the reference rate, the information set out in the previous slide is to be given to the consumer periodically;
 - (b) the new reference rate is to be made publicly available by appropriate means, which may include a publication on the bank's website or on a public advert; and
 - (c) the information concerning the new reference rate is to be kept available at the bank's premises and communicated personally to the consumer together with the amount of new periodic instalments.



Content of the Credit Agreement (Cont'd)

- The bank is to make available to the consumer, free of charge and at any time throughout the duration of the home loan, a statement of account in the form of an amortisation table.
- Every public deed to which the Regulations apply shall make a direct reference to the credit agreement entered into and between the bank and the consumer, the date thereof and shall state expressly that the consumer has received, read, understood and agreed to all the terms set out in the credit agreement, after due explanation by the Bank, as may be amended from time to time according to the terms thereof.



Early Repayment

- Full or partial early repayment: right of a consumer.
- In the event of early repayment:
 - (a) The consumer shall be entitled to a reduction of the total cost of the credit, such reduction consisting of the interest and the costs for the duration of the contract; and
 - (b) The bank shall be entitled to a fair and objective compensation, where justified, for possible costs which directly linked to the early repayment so long as the early repayment falls within a period for the borrowing rate is fixed.
- The compensation due to the bank cannot exceed the financial loss of the bank and no sanction may be imposed on the consumer.
- In calculating the level of compensation, a bank is to also give consideration to the impact of early repayment on administrative costs irrespective of whether the borrowing rate is fixed or variable. Furthermore the bank shall apply the same calculations to all consumers, irrespective of the reason why the early repayment was effected
- Where a consumer seeks early repayment, the Bank shall provide him, without delay after receipt of request for early repayment, on paper or on another durable medium, with the information necessary to consider such option. Such information shall, at least, quantify the implications for the consumer effecting such early repayment and shall clearly set out any assumptions used, which assumptions shall be reasonable and justifiable



Assignment

- Where the rights of the Bank under a credit agreement are, or the agreement itself is, assigned to a third party, the consumer shall be entitled to raise against the assignee any defence available to him against the original creditor, including the right to set-off.
- The consumer is to be informed of any such assignment, except where the Bank, by agreement with the assignee, continues to service the credit vis a vis the consumer.



Foreign Currency Loans

- In the context of foreign currency loans, the consumer is to have the right to convert the credit agreement into an alternative currency under specified conditions.
- The alternative currency shall be:
 - (a) The currency in which the consumer primarily receives income or holds assets from which the credit is to be repaid, as indicated at the time the most recent creditworthiness assessment in relation to the credit agreement was made; and / or;
 - (b) The currency of the Member State in which the consumer was either resident at the time the credit agreement was concluded or is currently resident.
- The exchange rate at which the conversion is carried out shall be the market exchange rate applicable on the day of application for conversion unless otherwise specified in the credit agreement.
- Where a consumer has a foreign currency loan, the bank shall warn the consumer on a regular basis on paper or on another durable medium at least where the value of the total amount payable by the consumer which remains outstanding or the regular instalments varies by more than 20% from what it would if the exchange rate between the currency of the credit agreement and the currency of the Member State applicable at the time of the conclusion of the credit agreement were applied.
- Such arrangements shall be disclosed to the consumer in the ESIS and in the credit agreement. Where there is no provision in the credit agreement to limit the exchange rate risk to which the consumer is exposed to a fluctuation of less than 20%, the ESIS shall include an illustrative example of the impact of a 20% fluctuation in the exchange rate.



Variable Rate Credits

- Where the credit agreement is a variable rate credit:
 - (a) Any indexes or reference rates used to calculate the borrowing rate shall be clear, accessible, objective and verifiable by the parties to the credit agreement and the Director General (Consumer Affairs); and
 - (b) Historical records of indexes for calculating the borrowing rates shall be maintained either by the providers of these indexes or by the Bank.



Advertising

- Any advertising and marketing communications concerning credit agreements shall be fair, clear and not misleading.
- Wording that may create false expectations for a consumer regarding the availability or the cost of a credit agreement is prohibited.
- Any advertising concerning credit agreements which indicates an interest rate or any figures relating to the cost of credit to the consumer shall refer to standard information set out in regulation 19 in a clear, concise and prominent way.



Advertising

- The information required in terms of regulation 19 is the following:
 - (a) The Bank's identity;
 - (b) That the product advertised is a credit agreement and, where applicable, that the credit agreement will be secured by a hypothec or privilege on residential immovable property, by a right related to residential immovable property;
 - (c) The borrowing rate, indicating whether this is fixed or variable or a combination of both;
 - (d) Particulars of any charges included in the total cost of credit to the consumer;
 - (e) The total amount of credit;
 - (f) The APRC which shall be included in the advertisement at least as prominently as any interest rate;
 - (g) Where applicable, the duration of the credit agreement;
 - (h) Where applicable, the total amount payable by the consumer;
 - (i) Where applicable, the amount of the instalments and the amount of each repayment of credit;
 - (j) Where applicable, a warning regarding the fact that possible fluctuations of the exchange rate could affect the amount payable by the consumer; and
 - (k) Where applicable, a warning concerning the risk of losing the immovable property in the event of non-observance of the commitments linked to the credit agreement.



Tying and bundling practices

- Whilst bundling practices are allowed, tying practices are prohibited.
- However, the bank can request the consumer or a family member or a close relation of the consumer to open or maintain a payment or savings account, where the only purpose of such an account is to accumulate capital to repay the credit, to service the credit, to pool resources to obtain the credit, or to provide additional security for the Bank in the event of default.
- The bank may also require the consumer to hold a relevant insurance policy related to the credit agreement. However, the bank is obliged to accept insurance policies from a supplier different to its preferred supplier where such policy has a level guarantee equivalent to the one proposed by the bank.



The APRC

- Defined in the regulations as the annual percentage rate of charge, being the total cost of credit to the consumer, expressed as an annual percentage of the total amount of the credit. It equates, on an annual basis, to the present value of all future or existing commitments (drawdowns, repayments and charges agreed to by a bank and the consumer).
- Calculated in accordance with the mathematical formula set out in the Second Schedule of the Regulations.
- The calculation of the APRC is based on the assumption that the credit agreement is to remain valid for the period agreed and that the Bank and the consumer will fulfil their obligations under the terms and by the dates specified in the credit agreement.
- Where the credit agreement provides for a variable borrowing rate, the APRC is calculated on the assumption that the rate and charges will remain fixed in relation to the level set at the conclusion of the contract.
- Where applicable, the additional assumptions set out in the Second Schedule of the Regulations shall be used in calculating the APRC.
- Indication of the APRC in the form of a range of two figures is not permitted. APRC must be expressed as a percentage, by reference to a precise figure or precise percentage. The APRC should reflect, to one decimal place, all existing or future commitments agreed to by the Bank and the consumer, and should be calculated in a uniform manner.



Other obligations

- In terms of regulation 21A(2), the Bank is to keep appropriate records concerning the types of immovable property accepted as a security, as well as the related underwriting policies used in relation to credit agreements.
- A bank is to ensure that it does not allow these Regulations to be circumvented in a way which could lead to consumers losing the protection granted to them by the Regulations as a result of the way in which its credit agreements are formulated, in particular, by integrating credit agreements into agreements, the character or purpose of which would make it possible to avoid the application of those measures.
- Any waiver by the consumer of any of the rights granted to him by the Regulations shall be null and void.
- Any provision in the credit agreement to the effect that the applicable law to the credit agreement shall be the law of a non-EU Member State, the protection granted by the Regulations shall continue to apply where the credit agreement has a close link with Malta or any other EU Member State.



ACQUIRING BANKS AND THE PAYMENT PROCESS



Regulation of payment services and acquiring of payment transactions

- Payment services are currently largely regulated by the second Payment Services Directive (PSD2) which is locally directly transposed into the Financial Institutions Act (Chapter 376 of the Laws of Malta) (FIA) and CBM Directive no. 1: Provision and use of payment services (CBM1).
- Acquiring of payment transactions is a payment service under the Second Schedule of the FIA. This means that acquiring of payment transactions is a licensable activity and is regulated by the PSD2, FIA and CBM1.
- The European Commission (EC) plans to adopt a legislative proposal on a third Payment Service Directive (PSD3) by the end of the second quarter (Q2) of 2023.



Merchant acquiring agreement

- Apart from these legislative requirements which regulate the payment process, the merchant and the acquiring bank also enter into an agreement which regulates the relationship between them during the payment process.

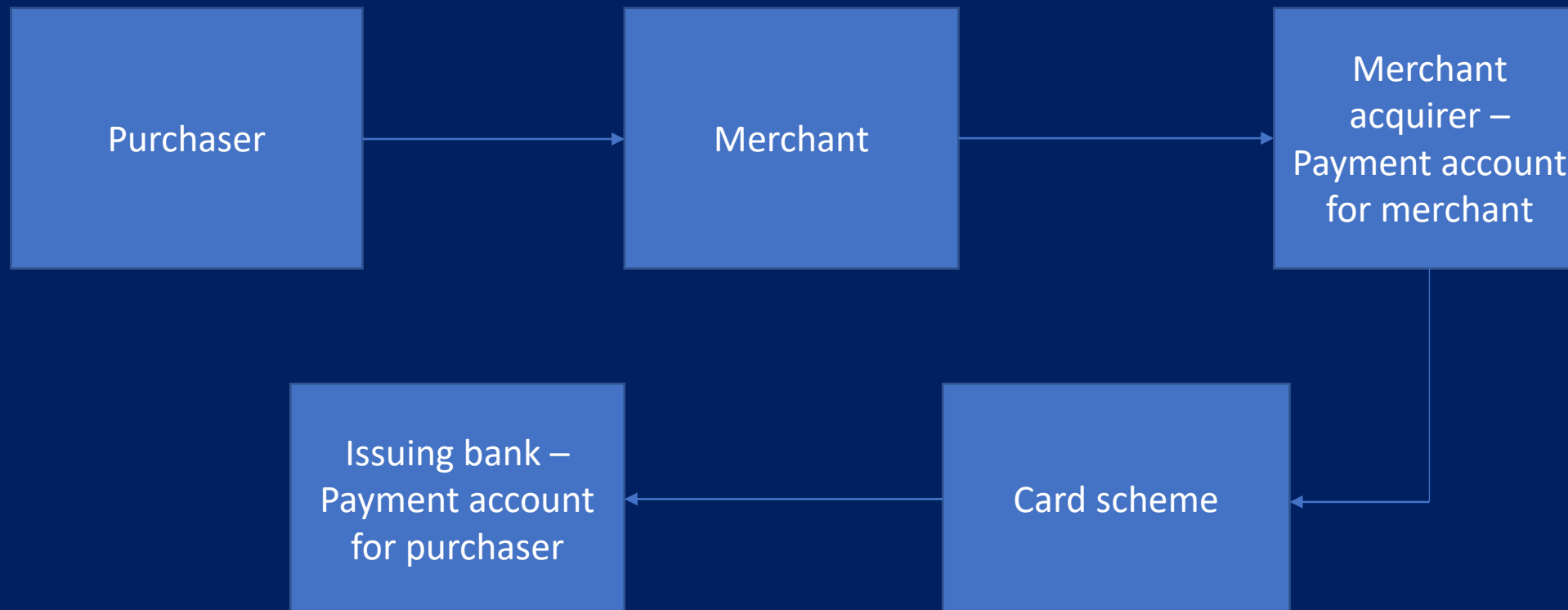


What is the acquiring of a payment transaction?

- The definition of the acquiring of a payment transaction under Article 7 (4) of the CBM1 is a payment service provided by a Payment Service Provider (PSP) contracting with a payee to accept and process payment transactions, which results in a transfer of funds to the payee.



The payment process and the acquiring bank



The payment process and the acquiring bank

1. The merchant accepts a purchaser's payment either online on its website or in its store at a point-of-sale (POS) device which is offered by a PSP.
2. The PSP connects with the acquiring bank to inform it about the transaction.
3. The acquiring bank requests the card scheme, for example VISA or Mastercard, to authorise the payment.
4. The card scheme requests the issuing bank for approval of the transaction



The payment process and the acquiring bank

5. The issuing bank checks if the purchaser has enough funds or available credit to carry out the transaction and approves or rejects the transaction.
6. If the payment is approved, the issuing bank routes the approval to the card scheme.
7. The card scheme routes the approval to the acquiring bank.
8. The merchant provides the goods or services to the purchaser.
9. The merchant requests the acquiring bank to transmit the payment order. Under Article 59 (3) of CBM1, the acquiring bank must transmit a payment order initiated by or through the merchant to the issuing bank within the time limits agreed between the merchant and the acquiring bank under the agreement into which they have entered.
10. The acquiring bank requests a settlement on behalf of the merchant through the card scheme



The payment process and the acquiring bank

11. The issuing bank makes the payment to the acquiring bank through the card scheme. The point when the issuing bank receives the payment order for the purpose of execution of time provisions is the point at which the issuing bank receives the claim. The issuing bank is then responsible under Article 59 (1) of CBM1 to ensure that the funds reach the acquiring bank's merchant account by the end of the following business day.

12. The funds are value dated and held by the acquiring bank in the name of the merchant as required under Article 59 (2) of CBM1.

13. The merchant requests payment from the acquiring bank to its main account



The payment process and the acquiring bank

14. The acquiring bank transfers the funds to the merchant's main account in accordance with the contractual agreement, following the deduction of chargebacks, interchange fees and acquirer fees. If the net balance is negative, the acquiring bank uses the line of credit which it has provided to receive funds from the merchant. Article 54 (2) of CBM1 states that if the merchant and the acquiring bank agree that the execution of the payment order shall start on a specific day or at the end of a certain period or on the day on which the purchaser has funds at the acquiring bank's disposal, the time of receipt is deemed to be the agreed day.

15. If the payment is not authorised, by the issuing bank, the issuing bank informs the card scheme which in turn, informs the acquiring bank.

16. The acquiring bank subsequently informs the merchant about the non-authorisation of the transaction.



Different types of acquiring banks

Recital 10 of PSD2 acknowledges that different types of acquiring models can be used apart from the traditional acquiring models structured around the use of payment cards. However, it is essential that merchants are given the same amount of protections, regardless of the type of payment instrument used, especially in the case of the acquiring bank's insolvency, execution times and information requirements.

