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Lower Hatch Street, Dublin 2

By email: conspol@dbei.gov.ie

31 August 2018

Dear Bill

Re: Public Consultation on gift voucher fees and expiry dates

The Electronic Money Association ("**EMA**") welcomes the opportunity to respond to the consultation on the Unfair Contract Terms (Gift Vouchers) Bill 2018 (the "2018 Bill")

The EMA is a trade body representing some 60 electronic money ("**e-money**") issuers and innovative payment service providers operating within the EEA, including Ireland. Our members are leading payments and e-commerce businesses worldwide, representing online payments, card-based products, vouchers and those employing mobile channels of payment. A list of EMA members is provided at the end of this letter.

We have provided responses in respect of questions 13, 16, 21, 31 and 33 of Part 2 (Questions for Businesses).

We would be grateful if you would consider our comments.

Yours faithfully

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

The EMA's Response

We would first like to address products that are subject to payments and financial services regulation. E-money cards and vouchers are subject to adequate consumer protection legislation at both EU and domestic level. Any additional obligations placed on issuers of E-money cards and vouchers would be unnecessary, and could reduce competition in the Irish E-money market. This could in turn impact the growth of e-commerce in Ireland without necessarily increasing consumer protection.

We have set out the existing legislative framework below:

E-money Cards and Vouchers

E-money card and voucher payment instruments ('E-money Instruments") are subject to existing Irish legislation, the European Communities (Electronic Money) Regulations 2011 (S.I. No. 183 of 2011) ("E-money Regulations") and the European Communities (Payment Services) Regulations 2018 (S.I. No. 6 of 2018) ("Payment Services Regulations"), which implement the Second Electronic Money Directive (2009/110/EC) ("2EMD") and the Second Payment Services Directive (2015/2366/EU) ("PSD2") respectively.

The E-money Regulations and the Payment Services Regulations address consumer risk by applying conduct of business rules on e-money issuers (i.e. credit institutions and e-money institutions), which include contractual information disclosure provisions (Part 3 of the Payment Services Regulations) and statutory obligations regarding the issuance and redemption of e-money, and the provision and use of payment instruments and related payment transactions (Part 3 of the E-money Regulations and Part 4 of the Payment Services Regulations). Electronic Money Institutions are also subject to safeguarding obligations in relation to funds received in exchange for e-money.

The E-money Regulations already regulate what and when fees can be imposed on the redemption of e-money. Section 53 of the E-money Regulations provides that an issuer must ensure that the consumer contract clearly and prominently states the conditions for redemption, including any fees, and that the e-money holder is informed of those conditions before being bound by any contract. Section 54 further provides that redemption fees may only be charged for early redemption by either party or for redemption over a year after the date of termination of the contract. Finally, section 54(2) requires any fees for redemption to be proportionate and commensurate with the costs actually incurred by the issuer. Issuers are restricted on any fees they may charge for redemption and it is unnecessary to legislate further on redemption fees.

Furthermore, e-money issuers issuing E-money Instruments in Ireland are subject to the Consumer Protection Code 2012 of the Central Bank of Ireland ("CBI") and the CBI supervises their conduct of business.

Unregulated Vouchers

Unregulated payment instruments ("Unregulated Vouchers") are subject to contract law and existing consumer protection law in particular the European Communities (Unfair Terms in Consumer Contracts) Regulations (S.I. No. 27 of 1995) ("Unfair Terms Regulations") (as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (S.I. No. 307 of 2000) and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No. 160 of 2013)), which implements the Unfair Terms in Consumer Contract Directive (93/13/EEC) (as amended by the Consumer Rights Directive (2011/83/EU)).

The law, as it currently stands, permits an expiry date for Unregulated Vouchers but this expiry date is not without constraint as it is subject to the *unfair term* test set out in section 3 of the Unfair Terms Regulations. Unfair Terms Regulations render any unfair terms in a consumer contract not binding on the consumer, including any contractual terms legislating for an expiration period and liability to pay fees. Accordingly, issuers are already subject to sufficient statutory obligations to ensure the terms upon which they offer their products are not unfair. Further, compliance with this regime means that issuers' contract terms are already held to a standard that is compliant in other industries where contracts are concluded with consumers for unregulated products.

As is it not yet established whether the 2018 Bill will legislate for unregulated or regulated payment instruments, our response below refers to issues that affect both products and uses the undefined term 'vouchers'.

Q13: What alternative sources of revenue could be utilised to make up for a loss in revenue from dormancy fees?
Q21: What alternative sources of revenue could be utilised to make up for any loss in revenue from issuance fees?

In general

We strongly recommend against the Ministry intervening in the gift voucher market by the setting or abolishing of any fees associated with gift vouchers. Setting the value of fees, the manner in which fees may be calculated, or specifying a range from which issuers may set the value of a fee are significant price interference measures where there is no evidence of a market failure to justify such a level of regulatory intervention.

Deter sales

EMA members experience low customer satisfaction in relation to products with an issuing fee, as consumers often consider such fees to be unfair. Specifically, an issuing fee is an immediate deterrent for consumers and has the effect of supressing sales. EMA members report receiving complaints from consumers at the point of sale regarding the charging of an issuing fee, which ultimately results in the consumer not completing the purchase of the voucher. We consider any legislation that results in the imposition of an issuing fee to be an undesirable consumer experience and an unreliable source of revenue. Accordingly, issuers would be placed at a significant disadvantage if circumstances forced them to charge an issuing fee.

As gift vouchers are 'gifted' to others, vouchers have the effect of encouraging consumers to shop at a retail outlet they may not traditionally frequent. By virtue of receiving a voucher as a gift, a recipient may make a purchase of greater value than the value of the voucher, may make purchases at other stores, may return to the same retail outlet and, permitting they have a positive consumer experience, recommend that particular outlet. In this way, gift vouchers have always been an ally of the retail industry. In the current retail climate, it is important to ensure a positive consumer experience and not deter spending with an upfront fee.

Restrict consumer choice

Regulatory interference in relation to fees would also reduce and restrict consumer choice, as the type of fee model an issuer adopts will affect the range of products and services an issuer is able to offer.

Voucher products are offered with different fee structures to best suit the individual product's value add-ons and services that are associated with the product. For example, some high value gift vouchers are accompanied by service add-ons that benefit consumers, such as a replacement service. For certain products, a consumer may be entitled to receive a replacement voucher in the event their voucher has been lost or stolen in return for a small fee. Issuers are not required to provide such services as gift vouchers are mostly treated as negotiable instruments where title is evidenced by possession.

A replacement service is generally offered by issuers on a good faith basis. To successfully claim under a replacement policy, the consumer does not have to objectively prove they are the voucher holder entitled to a replacement. The voucher issuer will replace the voucher permitting the consumer has some basic knowledge of the provenance of the voucher, for example, the name of the person who originally purchased the voucher and from what retail location. Accordingly, issuers are open to being exploited by fraudsters. They have, however, identified it as an important consumer protection offering, and so continue to offer this service.

The costs associated with providing a replacement service extend to (i) training retail staff to carry out customer due diligence at the point of sale; (ii) IT resources to collect and store the data captured from customer due diligence; (iii) providing customer services to answer customer queries relating to replacements; (iv) replacing the physical voucher; and (v) any cost of replacing a voucher to a rightful consumer who has been defrauded.

First, it is evident that the fee charged for a replacement service is justified. Second, the costs incurred from a replacement service borne by the issuer are often subsidised by a different revenue generating method, such as a dormancy fee, an inactivity fee, reactivation fee etc. Regulating fees by any means would disrupt the delicately balanced fee structure composed by issuers based on business experience, and may result in a regulatory environment where it would not be commercially viable to offer additional protections such as a replacement service.

Q16: Would a requirement to apply dormancy fees on an ad valorem or percentage basis give rise to other issues or difficulties. If so, please give details.

Excessive costs

A statutorily imposed requirement to apply any type of fees on an ad valorem or percentage basis would result in gift voucher issuers wasting unnecessary expense in order to comply.

The platform and technology employed to process gift voucher transactions is provided by payment processors. The payment processor handles the transaction from the point of sale when the voucher holder tenders a voucher to the retailer, to the finalisation of the transaction when the value of the transaction is settled to the retailer's bank account. When a voucher is used to make a purchase, the payment processor carries out a series of steps to process the transaction including (i) ensuring there are sufficient available funds on the voucher to cover the value of the purchase, (ii) applying any fees (iii) moving the funds to the retailer's account and (iv) settling the value of the purchase with the retailer.

Gift voucher issuers enter into contractual agreements with payment processors for the development and configuring of processing software as well as the provision of on-going payment processing services to enable issuers to offer gift vouchers to consumers through retail outlets. Any alteration to the steps carried out by the payment processor requires an alteration to the payment processing software. Whether a fee is charged, and what amount, is coded into the payment processor's software. Therefore, any requirement to change the calculation method of a fee would require the alteration of the payment processing software. The cost of such change would be borne by gift voucher issuers.

The extent of required development and associated costs differs between processors. The cost of compliance in this respect may be sufficiently substantial and time consuming that existing gift voucher issuers may decide to discontinue such products in the Irish market. Technology development costs also act as a barrier to new entrants who may find that their margins are depleted by the charges levied by processors.

Fee based on face value is not justified

A fee calculated with reference to the face value of the voucher, namely, on an ad valorem or percentage basis, is an unfair model for consumers.

For each gift voucher, an issuer must meet overhead costs such as those relating to the (i) producing the physical voucher itself; (ii) processing costs; (iii) fees to the card schemes; (iv) retailer staff training; (v) customer support costs (call centre, email etc.); and (vi) IT resources to operate the voucher scheme.

The face value of the gift voucher is not directly proportionate to the overhead costs incurred. For example, a voucher with a face value of €200 does not require twice the level of customer service expenditure than that of a voucher with a €100 face value.

A voucher issuer does not incur significantly additional operational costs by issuing a voucher with a higher face value in comparison to a voucher with a lower face value. For this reason, we consider fees calculated on an ad valorem or percentage basis cannot be rationalised and are therefore unfair to consumers.

Depreciation method

A dormancy fee calculated pursuant to an ad valorem or percentage basis applied to an available balance remaining on a voucher results in unnecessary costs to a voucher issuer with no recognisable benefit to the voucher holder. A percentage based balance reduction applied over the term of the voucher is equivalent to applying a reducing balance method of depreciation over the lifetime of an asset.

For example, a voucher with a face value of €20 is purchased by a consumer. The consumer subsequently uses the voucher to purchase a product for €19.95. Accordingly, there is a remaining balance of 5c and it is highly unlikely that this very small remaining balance will be used by the voucher holder for a subsequent purchase.

After the requisite amount of time, say, 12 months of non-activity, the voucher issuer would be expected to charge a dormancy fee calculated as a percentage of the balance. The 5c will therefore be periodically reduced in percentage increments until expiration. Such percentage based reductions will result in smaller and smaller incremental reductions that tend towards, but would never reach zero. The issuer would be required to apply operational and financial resources to maintain a voucher balance of insignificant value for the remainder of the term.

In light of the above, we do not support any requirement for fees to be calculated on an ad valorem or percentage basis. It is more efficient for an issuer, and of little impact on a voucher holder, to be able to employ a fee based mechanism that is clear and transparent to the user, and which enables the retiring of the voucher once its utility has been exhausted.

Q 31 What impact do you think that the introduction of a five-year expiry period will have on the level of redemption of gift vouchers?

We consider the introduction of a minimum five-year expiry period will have almost no impact on the level of redemption of vouchers. Our members report that approximately 70% of vouchers are redeemed within 3 months of purchase, this increases to 85% within 6 months of purchase and to 99% within 1 year. In light of this data, it may be that only 1% of voucher holders would benefit from a minimum expiry term of more than 12 months.

Accordingly, the five-year period will add little benefit to the majority of voucher holders, whilst significantly impacting voucher issuers, who have to continue to operate and service such accounts. Please see our response to question 33 below for further detail regarding the impact on issuers.

Q 33 Please indicate any concerns that you have about the impact of the proposed five-year minimum term for gift vouchers on the gift vouchers offered by your business, and in particular the impact on specific types of gift voucher.

We are against the introduction of the minimum expiry period as set out above, and particularly a lengthy period in the region of 5 years. We have set out below additional issues for consideration for any expiration period that is introduced.

Recall

The imposition of a minimum expiry period may result in issuers recalling their products and incurring unnecessary costs in order to comply.

A gift voucher often has important information directed at the voucher holder written on its face. Many gift vouchers make express representations, such as, '*valid 12 months from the date of purchase*'. Any change imposed to the minimum expiry period would render the information written on any existing vouchers incorrect and misleading to consumers and therefore subject to a product recall.

A recall of existing vouchers would extend to vouchers currently spread over hundreds of retailers as well as stock held by distributors and issuers. A successful recall would entail a coodinated effort between all parties in the channel, namely, the issuer, distributors and retailers as well as their commercial landlords in order to obtain permission to enter retail outlets to physically take back stock.

Existing vouchers displaying incorrect information in the posession of voucher holders are beyond the reach of a recall. Issuers would also be subject to costs of destroying the current stock as well as costs incurred to produce new stock and replace it in store. A recall event of this scale could cost a voucher issuer in excess of €100,000 and force them to pursue business opportunities elsewhere rather than replenishing recalled stock.

If a new mandatory expiry term is to be imposed, a transition period must be introduced whereby voucher issuers are permitted to sell their existing stock that is 'in-channel' prior to a mandatory minimum expiry term coming into force. In this scenario, an issuer would be required to produce a compliant product by a certain date but would be permitted to continue any existing stock whether currently sitting in store, with a distributor or with the issuer. In the event a five-year expiry term were imposed, a transition period of reasonable duration would be the only way to preserve the current amount of issuers in the market.

<u>Affect a primary source of revenue</u>

A primary source of revenue for gift voucher issuers is recouping funds that remain unredeemed by voucher holders after the gift voucher has expired. This is built into the business case, and enables the user to exchange funds for the equivalent face value of a voucher.

As an example, a €10 gift voucher that has a small balance remaining unspent, say 10c, requires greater cost and effort to redeem the remaining funds than the underlying return, for both issuer and voucher holder.

Gift voucher programme managers report that the vast majority of gift voucher spend happens in the first three months after activation, and after this time remaining funds are unlikely to be spent, usually because the remaining amount is very small or the voucher has been lost. The likelihood of a gift voucher being used continues to reduce over time, and it is inefficient and uneconomical to safeguard dormant balances for such gift vouchers.

A minimum term of five years would not allow a voucher issuer to retrieve this revenue for the duration of the term, which for such an excessive period of time, will have a significant impact on revenue and the viability of such products.

This delay in revenue realisation may alternatively result in a shift by providers towards other revenue generating methods, which are less favoured by customers. For example, a gift voucher issuer may begin charging monthly user fees and issuing fees. In our response to question 21 (issuing fees) above, we have explained the charging of issuing fees results in an unsatisfactory consumer experience and has the overall effect of deterring consumers from purchasing vouchers.

Our members have offered both types of models, and found that when they switched to a simple 12-month expiry, consumer feedback has always been positive. Consumers do not like fees and consider them to be unfair and unreasonable, whereas an expiry date, clearly communicated, and transparent is simple to understand and widely accepted.

Many gift vouchers currently have an expiry period of 12 months, as the majority of balances are spent within the first 3 months; 12 months is considered to be a fair and reasonable period that provides a good balance between customer experience and meeting the operational costs of the programme.

We therefore believe that for this type of product the most appropriate and transparent solution is a reasonable expiry period of approximately 12 months, which is clearly communicated to the customer prior to purchase and clearly and boldly displayed on the instrument itself.

<u>Affect an issuer's ability to cover operational costs</u>

As well as a primary source of revenue, recouping funds that remain unredeemed at the expiry of a gift voucher is a primary method gift voucher issuers use to cover operational costs and support the running costs of the programme.

The delivery of gift vouchers to consumers involves a long value chain. Vouchers are issued by a retailer or group of retailers, or perhaps a third party acting as intermediary. They are then marketed by an aggregator to third party retailers such as supermarkets for sale to consumers. Each party is paid a percentage of the face value of the voucher for their part of the business.

There are voucher printing, storage and fulfilment costs, as well as costs associated with electronic recording and tracking of vouchers from issuance to redemption.

The cumulative cost is in the region of 10% of the face value of a gift voucher. The consumer however is always given 100% of the face value of the voucher. This means that the retailers that redeem the vouchers could be faced with a discount of 10% off the price of goods or services that are sold. This is a significant discount, particularly for many retail items that carry a narrow margin.

In order to overcome this challenge, an issuer's operating and overhead costs are supported by revenue derived from funds that are left on vouchers that remain unredeemed after a reasonable period of time. It is therefore essential for the viability of such products that unredeemed funds can be recovered within a reasonable time period from issuance in order to cover such operating costs and the overall costs of the programme.

If this option were not available due to an unreasonably long expiry term, some gift card issuers would not be able to cover operating costs and other costs associated with the running of the programme and therefore be forced to terminate the product.

Not only would the imposition of a five year minimum term possibly result in current issuers leaving Ireland, a five year minimum term will also reduce competition by deterring new entrants. New start up issuers may not have been established in Ireland long enough to redeem any unused funds as they may not have been operating long enough to see their first round of stock expire. It is not commercially viable for a start up without a current revenue stream and recently incurred set-up costs to sustain a business for a period of five years before they receive their first revenue.

We therefore request that an allowance for the expiry of vouchers be set to a reasonable minimum period of validity, such as 12 months. This period ensures consumers have every opportunity to redeem their vouchers, while enabling the recovery of residual unused funds.

List of EMA members as of August 2018:

- Airbnb Inc
- Allegro Group
- American Express
- Azimo Limited
- Bitstamp
- BlaBla Connect UK Ltd
- Blackhawk Network Ltd
- Boku Inc
- CashFlows
- Circle
- Citadel Commerce UK Ltd
- Coinbase
- Corner Banca SA
- Curve
- Ebanx
- eBay Sarl
- Euronet Worldwide Inc
- Facebook Payments International Ltd
- First Rate Exchange Services
- Flex-e-card
- Flywire
- GoCardless Ltd
- Google Payment Ltd
- IDT Financial Services Limited
- Imagor SA
- Intuit Inc.
- Ixaris Systems Ltd
- Merpay Ltd.
- MuchBetter
- Nvayo Limited
- One Money Mail Ltd
- Optal
- Ozan
- Park Card Services Limited
- Paybase Limited
- Payoneer
- PayPal Europe Ltd
- PayPoint Plc
- Paysafe Group
- PPRO Financial Ltd
- PrePay Solutions
- R. Raphael & Sons plc
- Remitly
- SafeCharge UK Limited
- Securiclick Limited
- Skrill Limited
- Starpay Global Ltd.
- Stripe
- Syspay Ltd
- Transact Payments Limited
- Transact24 (UK) Ltd
- TransferWise Ltd
- TrueLayer Limited
- Trustly Group AB
- Uber BV
- Valitor
- Vitesse PSP Ltd
- Viva Payments SA
- Wave Crest Holdings Ltd
- Wirecard AG
- Wirex Limited
- Worldpay UK Limited