

Modification P39 Legal Drafting Consultation

Background

The BSC Panel, as recommended by the BSCCo, raised Modification Proposal P39 on the 20th September 2001. It proposes that changes are made to the payment procedure (section N8 of the Code) and the payment default procedure (section N9 of the Code) to remove inconsistencies between the Code and the operating procedures. At the meeting on the 18th October, the Panel agreed that P39 should be submitted to the Assessment Procedure and the Assessment Report be completed and presented to the Panel meeting on the 17th January 2002.

An industry consultation was carried out as part of the Definition Procedure. The consultation responses were included in the Definition Report, which was presented to the Panel on the 18th October 2001. This report can be obtained from the ELEXON website at the following link http://www.elexon.co.uk/ta/modifications/modsprops/P039/P39_Def_v10.pdf.

The Modification Group then met on the 30th October to discuss the consultation responses. In general the consultation responses supported the modification, although there were a number of issues raised and these have been addressed by the Modification Group as detailed below.

P39 Main Features

1. Payment Timescales

All respondents were in favour of modifying the Code to reflect banking reality, rather than enforcing compliance on the basis that it is not possible to guarantee the transfer of funds at a specified time within a day. One party suggested that the new deadline should be close of business, rather than close of banking business.

The Modification Group discussed this issue and decided that close of banking business was more appropriate as this may differ from close of business in the future. However the exact definition of close of banking business is still under discussion. It will then be added to Section X of the Code as a new defined term.

2. Payment Default Thresholds

The majority of respondents agreed that Payment Default Thresholds should be introduced to minimise administrative effort and that these should be set out within a new BSCP and ELEXON/FAA working instructions. Other comments received were as follows:

- One respondent did not agree that Payment Default Thresholds should be introduced on the grounds that the relaxation of timescales described above should reduce the number of defaults. Therefore, when a default does occur, this will be genuine and should be investigated regardless of the size.
- Another respondent that disagreed suggested that there should be a de minimus level rather than several thresholds. All defaults over [£50] would be progressed via the current procedure. They believe that providing one business day for a defaulting party to pay prior to the issue of a default notice should be sufficient for all parties, regardless of the size of the default. They also consider the suggested threshold of £50,000 to be excessive.

- One respondent agreed that Payment Default Thresholds should be introduced, however the largest defaults should be escalated on D+2 rather than D+1 which was proposed in P39.
- Finally one respondent suggested that consideration should be given to the set off rules in paragraph N2.6.1 of the Code which limits the transfer of funds to a party if they have an outstanding default.

Each of these points were discussed by the Modification Group and it was highlighted that the payment default thresholds represent the maximum time within which the FAA must progress a default. Therefore all Parties will still be required to conform to the payment timescales and the FAA will progress defaults within the timescales documented in section N9 of the Code. However the introduction of payment default thresholds will allow ELEXON the discretion to delay actions if appropriate.

The Modification Group discussed the thresholds levels in light of the consultation responses and amended the timescales and limits as follows:

- A default would be progressed by D+2 for any party with a cumulative outstanding debt of greater than [£250,000].
- A default would be progressed by D+7 for any party with a cumulative outstanding debt of between [£20,00 and £250,000].
- A default would be progressed by D+15 for any party with a cumulative outstanding debt of less than [£20,000].

3. Letters of Credit

The consultation noted that the new procedures should take into account the time it takes to call on Letters of Credit. It was suggested that the exact process would be discussed as part of the Assessment Procedure, however respondents were invited to express any views that they wished to be included in the discussion.

Respondents agreed that the entire process should be reviewed as part of the Assessment Procedure. It was noted that:

- Care should be taken not to give undue advantage to parties providing Letters of Credit rather than cash.
- Any additional costs should be allocated to those causing them.
- Letters of Credit should not be called on without the relevant party being given advance notification and an opportunity to remedy the position.

These comments have been taken into account while drafting the legal text and BSCP.

4. Payment transfers

All respondents agreed that it is not appropriate for charges relating to payment transfers to be incurred by the BSCCo and, in turn, smeared across all parties. Therefore a specific statement in the Code would be beneficial to clarify this issue.

The Modification Group noted that the legal text should reflect the fact that it is only additional transfer costs that are paid by the relevant Party and that the costs are only incurred when the branch of the bank used by the relevant Party is outside the UK.

Consultation

Following the Modification Group meeting the legal text and BSCP have been drafted and redlined copies are attached. Please note that it has not been necessary to create a new BSCP. Instead a Payment Default section has been added to BSCP301 Clearing, Invoicing and Payment.

Views are now being sought on the final Modification Proposal to ensure that there are no issues that have not been resolved by the changes made by the Modification Group. Parties are also requested to provide any comments on the legal drafting or the draft BSCP. Please note the legal text and draft BSCP are also being issued to the FAA for impact assessment.

Please send your responses by close of business on Wednesday 12th December 2001 to the following e-mail address:

Modifications@elexon.co.uk

Please entitle your e-mail 'P39 Consultation/Assessment'

Any queries or questions on the content of this consultation should be addressed to Sarah Parsons (sarah.parsons@elexon.co.uk) at ELEXON.