

Payment Services Directive

Introduction

The Payment Services Directive (PSD) is a European Directive which is intended to harmonise the regulation of Payment Service providers and allow for cross-border services to be provided more easily within the EEA by creating a new category of payment service provider – in addition to credit institutions and E-money issuers - known as a Payment Institutions. The primary effect of this in the UK is to bring some firms under the Financial Services Authority jurisdiction who had previously been for the most part unregulated.

The main interested subjects are businesses that provide clearing and settlement and payment services such as banks, building societies including money transfer operators, merchant acquirers, e-money issuers and non-bank credit card issuers.

Rationale and objectives

The Payment Services Directive was adopted by the EU Institutions on 1 November 2007 in order to overcome the obstacles of different national standards applied to payment services such as cash transfers and withdrawals, direct debits and standing orders as well as money remittance (cash transfer from payer to payee through a payment service provider).

Each Member State will have to implement the main lines of the directive into national law by 1 November 2009 defining the information requirements and other rights and obligations which will be applicable to many payment services transactions in the European Economic Area (EEA). The final objective is the creation of a Single European Payment Area (SEPA), an infrastructure where cross-border Euro payments can be made as easily, safely, efficiently and inexpensively as within national borders.

UK non-bank payment service providers will be able to use their licence obtained in the UK to passport into and compete within other payment markets across the EU. This will bring a reduction of legal and administrative costs thus encouraging UK providers to expand into other EU markets under a set of harmonised rules.

A higher degree of competition and a wider choice of payment services providers should be available to consumers, where market participants operate under a common regulatory framework.

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Who

The following are the types of firms affected by the payment services directive.

1. credit institutions
2. electronic money issuers (also regulated by the Electronic Money Directive)
3. post office giro institutions
4. money transfer companies
5. ATM operators
6. payment institutions
7. mobile phone operators and other digital payment providers
8. the European Central Bank, national banks when not acting as monetary public authorities
9. Member States and local authorities when not acting as public authorities

Activities

Anyone performing the activities listed in part (1) below may be affected by the Payment Services Directive. Part (2) clarifies the limitations on the scope of the Directive.

(1) Any of the following activities constitute payment services when carried on as a regular occupation or business activity:

- (a) Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account.
- (b) Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account.
- (c) Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider:
 - execution of direct debits, including one-off direct debits;
 - execution of payment transactions through a payment card or a similar device;
 - execution of credit transfers, including standing orders.
- (d) Execution of payment transactions where the funds are covered by a credit line for a payment service user:
 - execution of direct debits, including one-off direct debits;
 - execution of payment transactions through a payment card or a similar device;
 - execution of credit transfers, including standing orders.
- (e) Issuing payment instruments and acquiring payment transactions.
- (f) Money remittance.
- (g) Execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services.

(2) The following activities do **not** constitute payment services:

- (a) Payment transactions executed wholly in cash and directly between the payer and the payee, without any intermediary intervention.
- (b) Payment transactions between the payer and the payee through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee.

- (c) The professional physical transport of banknotes and coins, including their collection, processing and delivery.
- (d) Payment transactions consisting of non-professional cash collection and delivery for the purposes of a not-for-profit or charitable activity.
- (e) Services where cash is provided by the payee to the payer as part of a payment transaction for the purchase of goods or services following an explicit request by the payer immediately before the execution of the payment transaction.
- (f) Money exchange business consisting of cash-to-cash operations where the funds are not held on a payment account.
- (g) Payment transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee:
- paper cheques of any kind, including travellers' cheques;
 - bankers' drafts;
 - paper-based vouchers;
 - paper postal orders.
- (h) Payment transactions carried out within a payment or securities settlement system between payment service providers and settlement agents, central counterparties, clearing houses, central banks or other participants in the system.
- (i) Payment transactions related to securities asset servicing, including dividends, income or other distributions, and redemption or sale, carried out by persons referred to in (h) or by investment firms, credit institutions, collective investment undertakings, asset management companies providing investment services or by any other entities allowed to have the custody of financial instruments.
- (j) Services provided by technical service providers, which support the provision of payment services, without the provider entering at any time into possession of the funds to be transferred, including:
- the processing and storage of data;
 - trust and privacy protection services;
 - data and entity authentication;
 - information technology;
 - communication network provision; and
 - the provision and maintenance of terminals and devices used for payment services.
- (k) Services based on instruments that can be used to acquire goods or services only:
- in or on the issuer's premises; or
 - under a commercial agreement with the issuer, either within a limited network of service providers or for a limited range of goods or services, and for these purposes the "issuer" is the person who issues the instrument in question.
- (l) Payment transactions executed by means of any telecommunication, digital or IT device, where the goods or services purchased are delivered to and are to be used through a telecommunication, digital or IT device, provided that the telecommunication, digital or IT operator does not act only as an intermediary between the payment service user and the supplier of the goods and services.
- (m) Payment transactions carried out between payment service providers, or their agents or branches, for their own account.
- (n) Payment transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking, without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group.
- (o) Services by providers to withdraw cash by means of automated teller machines acting on behalf of one or more card issuers, which are not party to the framework contract with the customer withdrawing money from a payment account where no other payment service is provided.

Types of payment made through money service providers

There are two main payment types:

- four party systems, where two payment service providers are involved: one bank providing services to the originator of a payment and another bank providing a service to the recipient. There is usually a payment scheme that connects paying and receiving institutions, or they may be linked directly through a correspondent banking relationship. Examples of this type in the UK are systems like BACS, CHAPS and CCCL, and card schemes like VISA, MasterCard and LINK;
- three party systems, where only one payment service provider deals with both the originator and recipient of a transaction. Examples of this type of payment scheme in the UK are E-money issuers like PayPal and most money remitters.

Exemptions

Certain institutions will be able to provide payment services without applying for authorisation: the Bank of England, Post Office Limited and government departments or local authorities. Apart from these all firms classified as Small payment institutions will only need to be registered.

Institutions that are totally exempt from the requirements of the Regulations in the UK are the National Savings Bank, municipal banks and credit unions; these institutions will however still need to be listed in the register.

Competent authorities

The main competent authority dealing with authorisations, registrations and enforcement of compliance with the conduct of business requirements will be the FSA.

Official complaints against a company will be dealt with by the Financial Ombudsman Service (FOS) if a client refers the matter to the Ombudsman.

The HM Revenue and Customs (HMRC) will supervise compliance with the Third anti-money laundering Directive.

Implementation of rules related to the access to the money service systems will be dealt with by the Office of Fair Trading (OFT).

Authorisation & Registration

In order to legally operate as a payment services provider a firm needs approval from a competent authority. Some businesses need to receive full authorisation from the competent authorities while others will only need to be registered as payment services providers: this will differentiate firms that are able to operate outside their home State from firms that will not have any passport rights and will only be allowed to operate within the Member State they are registered in.

If a payment service business has the size of a small payment institution and has different domestic branches, then the single branches will not need to be registered and will be considered as one single business in the same Member State.

Firms who meet all of the below criteria do not require FSA authorisation but will still need to register

- transaction values lower than 3 million euro per month
- no people of staff or managers with previous financial crime or money laundering convictions
- will not use passport rights or operate cross border
- head office or place of residence is in the UK

Provisions

1. Changes to the FSA Handbook

The Dispute resolution module (DISP) will include the complaints handling rules for payment service providers, the FOS module will expand the jurisdiction of the Financial Ombudsman including the out-of-court redress function, the rules of the Decision Procedure and penalty Manual (DEPP) and the Enforcement Guide (EG) on enforcement and penalties will be applied to breaches to PSD regulation.

2. Changes to other legislation

- the FSMA 2000 will undergo amendments to extend FSA powers to set the compulsory jurisdiction of the ombudsman scheme by enabling it to subject payment service providers to, and charge them fees for, operating that jurisdiction; and to enable it to apply internal complaints-based handling rules to payment service providers;
- amendments to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, to provide that funds received by payment institutions do not constitute a “deposit” or “e-money”. The FSA proposes to issue guidance on this issue in due course;
- amendments to the Distance Marketing Regulations 2004, to provide that, where there is overlap between those regulations and the Payment Service Regulations, the latter will apply instead;
- amendments to the Money Laundering Regulations 2007 to include all payment service providers within its scope, and to provide HMRC with an information gateway to enable HMRC to provide information to the FSA, so that it will be able to carry out its PSD supervision effectively.
- Some of the information disclosure requirements set in the Distance Marketing Directive will be disapplied where the new information requirements set in PSD apply to a firm.

3. Passporting rights

The main distinction will be between Authorised payment institutions that will be able to use their passporting rights in other EEA States and Small service providers that will only be required to register under the PSD and will not be allowed to operate outside national boundaries.

When passporting via a branch or offering cross-boarder services a firm must notify their competent authority before conducting any business in another jurisdiction. Once a firm is approved it will operate using 'home state' rules that is to say the rules of the country it operates out of. This should prevent conflicts from some European countries where they consider payment services activities to be MiFID (Markets in Financial Instruments Directive) business.

Territorial scope of compulsory jurisdiction

Any complaint about the activities of a payment service provider carried on from the UK is covered by the compulsory jurisdiction of the Financial Ombudsman Service. Also incoming EEA firms operating in the UK thanks to passport rights will be under the same compulsory jurisdiction. When a payment transaction originates or terminates outside the EEA using an EEA currency is called "one-leg transaction" and will be subject to limited application of the conduct of business rules set in the Directive (only the value dating and availability of funds requirements apply). Consumers can already complain to the Financial Ombudsman about this type of transactions, that are classified as ancillary banking services, against firms that are authorised by the FSA. The HM Treasury suggests to guarantee the same level of protection to all consumers who want to raise complaints about a one-leg transaction against any type of payment service providers, proposing to extend the scope of the compulsory jurisdiction to transactions in non-EEA currencies and transactions originating or terminating outside the EEA.

European variation in application of the Directive

Member States have the option to modify some of the rules of the Directive by 1 November 2009 such as:

- Waiver of the application of PSD provisions with regard to institutions under Article 2 of the capital requirements' Directive – Article 2(2)
- Not to apply on going capital requirements when a payment institution is included in the consolidated supervision of the parent credit institution – Article 7(3)
- Three methods of calculation of on going capital for payment institutions – (Article 8§1)
- Application of safeguarding requirements to genuine (non hybrid activities) payment institutions – Article 9(3)
- Delegation of the task of carrying out on-site inspections to the competent authorities of the host Member State – Article 25(3)
- Limitation of payment activities carried out by waived entities under Article 26 – Article 26(4)
- Burden of proof on the provision of information requirements lies with the payment service provider – Article 33
- Not application of out-of-court procedures to corporates – Article 51(2)
- Reduction of payer's liability for unauthorised use of payment instrument taking into account the nature of personalised security features of the payment instrument – Article 61(3)
- Shorter maximum execution times for purely national payment transactions – Article 72