



HM Treasury

# Implementation of the revised EU Payment Services Directive II

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February 2017





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ISBN 978-1-911375-35-7

PU2004

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# 1 Introduction

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## The subject of this consultation

**1.1** This consultation invites views on the proposed steps that the UK government will take to make sure the United Kingdom (UK) meets its obligation to transpose the revised European Union (EU) Payment Services Directive II (PSDII).

**1.2** The consultation is accompanied by draft implementing legislation. A consultation stage impact assessment of the proposed changes will be published before the end of the consultation.

**1.3** This consultation provides interested parties with the opportunity to engage with the government on how it can best implement the directive into UK law, taking into account Better Regulation objectives of ensuring risk-based and proportionate implementation. It aims to:

- explain the scope of the PSDII
- explain the key provisions of the directive that have changed from the first Payment Services Directive (PSD)
- present the government's proposed approach to implementation
- consult on options for implementation, where there is discretion for member states
- provide stakeholders with a list of questions to assist preparation of their written input into the consultation process

## Who should read this?

**1.4** This consultation should be read by those who will be affected by the changes proposed. This will be any individual, firm or group that is a stakeholder in the UK payment service market including, though not limited to: banks, building societies, e-money institutions, payment institutions, consumer groups, charities, retailers, and other payment users and interested parties.

## Background and existing regulation in the UK

**1.5** The PSDII was published in the Official Journal of the European Union on 23 December 2015<sup>1</sup>. The directive widens the scope of the PSD, and updates and complements the EU rules put in place by the PSD that member states are required to meet, in order to:

- contribute to a more integrated and efficient European payments market
- improve the level playing field for payment service providers (PSPs), including new players
- make payments safer and more secure
- protect consumers
- encourage lower prices for payments

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2366&from=EN>

**1.6** The government is required to implement the PSDII in the UK from 13 January 2018 to meet its treaty obligations and avoid the risk of facing infraction proceedings.

**1.7** The European Commission (Commission) first proposed the PSD in December 2005. The harmonised framework for payment service provision established by the PSD also provided the legal underpinning for the Single Euro Payments Area. The PSD, which was adopted by the European Council and European Parliament in November 2007 and published in the Official Journal of the European Union on 5 December 2007, was reviewed in 2012, and the Commission proposed revised legislation in July 2013.

**1.8** With the emergence of a range of electronic wallets and new payment products in the 1990s, the E-money Directive (EMD) was introduced in 2000 setting the regulatory framework for issuers of electronic money. The EMD was updated to take account of technological changes, and to remove barriers to entry to non-bank issuers like mobile phone operators and internet money-remitters through the second EMD (EMD2), which was transposed into UK law in April 2011, through the Electronic Money Regulations 2011.

**1.9** The issuing of e-money is not itself a payment service but may entail the provision of payment services. E-money issuers are permitted to engage in the provision of payment services without needing to be separately authorised or registered under the Payment Services Regulations 2009 (PSRs). The PSRs also contain conduct-of-business rules that are applicable to most EMIs for the payment services part of their business.

## **UK approach to negotiations on PSDII**

**1.10** The government's objective for the negotiation of PSDII was to align the requirements as far as possible with existing UK practice, with a view to minimising any negative impact on UK industry and consumers while ensuring that the UK can realise the potential benefits related to increased competition and consumer protection.

## **UK proposed approach to implementation**

**1.11** On 23 June 2016, the EU referendum took place and the people of the UK voted to leave the EU. Until exit negotiations are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period, the government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

**1.12** The government's default approach for implementing EU legislation is copy-out. However, to reduce the cost for businesses and consumers, the government proposes to build on the existing PSRs, including the continued use of derogations exercised in the implementation of the PSD, in order to ensure continuity and consistency with the implementation of the PSD in the UK and that the payment services regime remains, as far as is possible, tailored for the UK payments market.

**1.13** With the payments landscape undergoing rapid change, as reflected in the wider scope of the PSDII, and the expectation that this is likely to continue as innovation in financial services develops, it is important that the powers of the competent authorities enforcing the PSDII are sufficient and have the appropriate degree of flexibility to respond to emerging regulatory challenges.

### Question 1

Do you agree with the government's proposed approach to implementation of the PSDII? Bearing in mind the maximum harmonising nature of the PSDII, do you think the structure of the regulatory regime will allow the UK's competent authorities to enforce the regulations in a fair and equal way towards all payment service providers?

### Question 2

A consultation stage impact assessment of the proposed changes will be published before the end of the consultation. Do you have any comments on the impact of the PSDII set out in the impact assessment?

## Legislative changes required to implement the PSDII

**1.14** Draft regulations showing the government's proposed approach to implementation, using copy-out wherever possible, are at Annex B. These draft regulations revoke the existing PSRs and replace them with a new set of Payment Services Regulations. The government considers that this is likely to make the UK legislation easier to use. Large parts of the new draft regulations reproduce the equivalent parts of the PSRs. The draft also indicates, against individual regulations, the related regulations in the existing PSRs and relevant articles in the PSDII. A table showing the correlation between Articles in the PSD and the PSDII can be found in Annex II of the PSDII.

**1.15** In consequence of the amendments to the provisions in the existing PSRs, provisions in other existing legislation will need to be amended. The draft regulations contain some of the more significant consequential amendments to other legislation (including some of the amendments to the Electronic Money Regulations 2011); the final regulations will include all necessary consequential amendments.

## Timeline for implementation

**1.16** The PSDII was adopted on 25 November 2015 and member states are required to transpose its provisions into national law by 13 January 2018. A timeline is set out in Box 1.A below.

**1.17** Given the government's aim of reducing the burden of implementing this directive on business where possible, the government aims to finalise and lay the final implementing legislation in Parliament in early 2017 to provide industry with as much time as possible to adjust to any changes required.

### **Box 1.A: Deadlines in PSDII and in the draft regulations**

#### **13 January 2017**

European Banking Authority (EBA) to submit draft regulatory technical standards (RTS) on strong customer authentication and communication (SCA) and draft implementing technical standards to the Commission.

Deadline for EBA guidelines on the minimum amount of professional indemnity insurance or comparable guarantee, under Article 5.

#### **13 July 2017**

Deadline for EBA guidelines concerning the information to be provided in an application for the authorisation of payment institutions, under Article 5.

Deadline for EBA draft implementing technical standards on the information to be provided by competent authorities to the EBA for the register, under Article 15.

Deadline for EBA's guidelines concerning the establishment, implementation and monitoring of the security measures, including certification processes, in relation to operational and security risks under Article 95.

#### **13 January 2018**

Deadline for EBA's draft RTS on cross-border cooperation and passporting, under Article 28.

Deadline for the EBA's draft RTS on operation of central EBA register.

Deadline for EBA guidelines on complaints procedure, under Article 100.

Deadline for EBA guidelines on improving incident reporting, under Article 96.

Member states to adopt and publish implementing laws, regulations and administrative provisions necessary for compliance, and notify the Commission and EBA of competent authorities.

#### **13 July 2018**

Deadline for payment institutions to comply with Title II requirements.

#### **Autumn 2018**

Expected date EBA SCA RTS and security measures (as set out in Article 155) will apply.

#### **13 January 2021**

Commission will submit a report on the application and impact of the PSDII.

# 2 Scope and definitions

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**2.1** Title I and the Annex 1 of the PSDII set out the subject-matter of the directive, the types of PSPs and payment service activities covered, and the definition of relevant terms.

**2.2** This chapter of the consultation document covers:

- i. the scope of the directive: providers and activities
- ii. the negative scope of the directive
- iii. other changes to the scope of the directive

## i. Scope of the PSDII

### Payment Service Providers

**2.3** The following types of PSP are covered by the directive:

- payment institutions, including registered institutions
- credit institutions
- e-money institutions
- the Post Office Limited
- central banks, other than when acting in their capacity as a monetary authority or carrying out other functions of a public nature
- government departments and local authorities, other than when carrying out functions of a public nature

**2.4** Further discussion on new provisions to payment services legislation in the form of rights for payers to use “third party” firms - account information service providers (AISPs) and payment initiation service providers (PISPs) - is set out in Chapter 6.

**2.4.1** Article 2(5) of the PSDII allows member states to exercise a derogation to waive all or parts of the directive for certain institutions. These include:

- the National Savings Bank, including National Savings and Investments
- credit unions
- municipal banks

**2.4.2** This derogation mirrors a parallel derogation in the Capital Requirements Regulation (CRR), which covers the prudential rules for banks, building societies and investment firms, and is the same as under the PSD. During the implementation of the PSD, the decision was taken to exempt all of these institutions on the following grounds:

- it would not be appropriate to apply the provisions to the National Savings Bank, but it should comply with the conduct of business provisions to products that would otherwise be in scope of the directive on a voluntary basis

- the directive would impose a disproportionate regulatory burden on the municipal bank and credit union sector

**2.5** Credit unions in the UK provide basic banking services, including to the financially excluded. The UK would not want the directive to limit current and future payment services provided by credit unions. As set out during the implementation of the PSD, the requirements could impose a disproportionate regulatory burden on the sector, which might result in the sector being unable to offer basic financial services to low income consumers.

**2.6** The government's policy aim is to avoid constraining the ability of credit unions to offer payment services to their members, while maintaining the redress protection that members are currently afforded through the Financial Ombudsman Service (FOS).

**2.7** The government also welcomes innovations in cheque submission and clearing and the move by the Cheque and Credit Clearing Company to cheque imaging. Cheques remain paper based payments instrument and the government does not propose to extend the provisions under the directive to cheques and cheque imaging.

### Question 3

Do you agree that the government should continue to exempt the institutions listed above from the PSDII?

## ii. Negative scope

### Electronic communications networks and services exemption

**2.8** The PSD exempted transactions executed by means of, and delivered or used through, telecommunication, digital or IT devices. The PSDII updates this exemption so that providers of electronic communication networks or services can provide certain goods and services, up to given limits, without needing to be authorised or registered.

**2.9** The goods and services that fall under the exemption are:

- digital content, such as music and digital newspapers
- voice-based services, such as premium rate phone numbers
- tickets, and
- charitable activity such as donations

**2.10** As the intention is for the exemption to be used for lower-value and micro-payments, individual transactions are exempt only if they do not exceed €50 and the cumulative value of payment transactions for an individual subscriber does not exceed €300 per month.

**2.11** Firms that provide such exempted services must notify and provide an auditor's opinion to the Financial Conduct Authority (FCA) on an annual basis, to show that they comply with these limits. The activity will also be listed in the payment services register.

**2.12** The government is considering whether, within a single transaction, the exemption should cascade to include other intermediaries in the transaction that facilitate the transfer of money between a merchant and the network or service provider. This could encourage innovation in billing mechanisms which would ultimately benefit the payment user. Intermediaries would need

to work with networks or service provider to ensure the spending limits are not breached. However, even if intermediaries are able to rely on this exemption, if they provide other payment services (such as providing payment accounts to merchants or undertaking activity that falls into any of the activities of an acquirer of payment transactions, as set out at Appendix 1 of the PSDII) they will need to be authorised or registered for those services.

**2.13** The €300 cumulative spend per subscriber per month has been highlighted as a particular issue by some network and service providers in terms of the difficulties associated with tracking such expenditure, and with a perceived conflict with the EU Universal Services Directive. The government would like to better understand how firms that may use the exemption would track cumulative spend to inform the implementation approach. Network or service providers will still need to meet obligations under the EU Universal Services Directive, such as the provision of Direct Enquiry services, even when the cumulative spending threshold is reached.

#### **Question 4**

If you intend to make use of the electronic communications networks and services exemption, how do you intend to track the €50 and €300 spending limit?

#### **Question 5**

Is the approach on cascading useful to intermediaries given the limits on the exemption and the potential need for authorisation or registration for other services provided? What types of business models would benefit?

### **Limited network exemption**

**2.14** The PSD exempted payment transactions based on payment instruments accepted only within the issuer's premises or certain limited networks, or used to only acquire a "limited range" of goods or services. The EMD2 also applies this limited network exemption to e-money issued on instruments falling within the exemption.

**2.15** The PSDII clarifies this exemption by making explicit that the exclusion can only apply to transactions where the payment instrument can be used within a specific retailer or retail chain, to acquire a "very limited range of goods and services" or where the payment instrument is regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services. Examples of instruments that the exemption may still cover include store cards, fuel cards, membership cards, and public transport cards.

**2.16** In order to ensure more coherent supervision of such networks across member states, the PSDII provides that service providers carrying out activities which fall under the limited network exemption must notify the competent authority if the total value of transactions executed over the preceding 12 months exceeds €1 million. The government proposes that in the UK annual notifications are made to the FCA and that notifying firms are included on the payment services register.

## Commercial agent exemption

**2.17** Under the PSD, the commercial agent exemption has applied to payment transactions carried out between the payer (e.g. a buyer) and the payee (e.g. a seller or merchant) through a commercial agent (e.g. a salesperson or marketplace operator) authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer and/or the payee.

**2.18** Under the PSDII, this exemption has been narrowed, so that it only applies to transactions where the commercial agent is acting on behalf of one side of the transaction, either the payer or the payee. In line with this, the government expects that a number of 'platform' business models which match buyers and sellers for goods and services are unlikely to benefit from the new exemption and will now fall within the scope of the PSDII.

### Question 6

Do you agree with the government's interpretation of the limited network and commercial agent exemptions? Which business models do you think may now be brought into scope that were previously exempt?

## iii. Other changes

### ATM operators exemption

**2.19** The PSD exempted cash withdrawal services provided by independent ATM operators but did impose transparency requirements for ATM services offered through banks or other PSPs. The PSDII extends these transparency requirements to include services through independent ATM operators, but does not require independent ATM operators to become authorised.

**2.20** All ATM services falling within the exemption will be required to comply with basic transparency requirements, covering the provision of information on withdrawal charges before the withdrawal, as well as on receipt of cash. The government understands that all ATM operators are already providing this information as it is a requirement of participation in LINK, the UK's ATM network. The practical implications of this change are therefore limited.

**2.21** Given their existing oversight of LINK and the card schemes, the government believes the Payment Systems Regulator (PSR) would be the most appropriate competent authority to ensure effective monitoring of compliance and to address any issues that arise in relation to the ATM exemption and transparency requirements.

### One-leg and non-EU currency transactions

**2.22** Under the PSD, the transparency and conduct of business requirements for PSPs only apply where both the payer's and the recipient's PSP are located in the EU and where the payment is made in euros or another member state currency.

**2.23** The PSDII extends the geographical scope of these requirements. Transparency and conduct of business requirements will also apply to 'one-leg' transactions (payments to and from third countries, where one of the PSPs is located in the EU) and to transactions in non-EU currencies which have at least one leg in the EU.

**2.24** As such, the PSDII now covers the following payment transactions:

- where both of the PSPs are in the Union, for payment transactions in all currencies

- to the 'EU part' of a transaction, in all currencies, where one of the PSPs is located within the EU

**2.25** Whether foreign currency transactions are cleared and settled abroad is not considered relevant. The EU part of the transaction will be in scope if at least one of the PSPs is within the Union.



# Authorisation, capital, safeguarding and prudential requirements

## 3

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**3.1** This chapter of the consultation document covers articles in Title II of the PSDII, which establishes the requirements for authorisation of payment institutions. This Title also establishes the minimum registration requirements for firms eligible to have all or part of the prudential authorisation regime waived.

**3.2** This chapter, covering Articles 5 to 37 of the directive, sets out:

- I. the objectives of Title II
- II. an overview of the Title II requirements
- III. the role and powers of the competent authority
- IV. the responsibilities of firms seeking authorisation or registration
- V. access to payment systems and payment account services
- VI. policy options permitted under Title II

### I. Objectives of Title II

**3.3** The authorisation requirements are designed to enable payment institutions to passport throughout the EU on the basis of authorisation in their home member state. UK providers can take full advantage of the passporting element of Title II and operate in other member states and the UK will continue to operate a broadly harmonising prudential licensing regime, recognised by all other member states and containing a degree of discretion for the competent authority in managing the risks generated by payment institutions.

**3.4** In implementing Title II provisions, the government recognises that payment institutions engage in more specialised and restricted activities than credit institutions and e-money issuers. This will help ensure that the regime maintains financial soundness and consumer protection, while continuing to promote competition.

### II. Overview of the Title II requirements

**3.5** Title II in the PSDII establishes the rules for firms applying for authorisation as a payment institution. In addition to the rules set out in the PSD:

- 1 **applications:** Article 5 contains a comprehensive list of information that firms must provide in their application for authorisation to the FCA. The EBA will issue guidelines on the information to be provided to the competent authorities in the application for the authorisation of payment institutions and update the guidelines on a regular basis, or at least every three years
- 2 **acquisitions of shares in payment institutions:** In Article 6, a proposed or existing shareholder has an obligation to inform the competent authority of any decision to

acquire or increase a shareholding in that payment institution. The competent authorities can oppose or block such acquisitions in certain circumstances

- 3 **location of authorisation:** In addition to a payment institution being required to have a registered office under the national law of its home member state, it is also required to carry out at least part of its payment service business in that home member state
- 4 **EBA public register:** Under Article 15, the EBA will develop, operate and maintain an electronic, central register of authorised payment institutions containing the information notified by the competent authorities under Article 14
- 5 **right to passport:** Article 28 stipulates that an authorised payment institution wishing to passport for the first time into another member state must inform its home competent authority. The EBA will develop an RTS specifying the framework for cooperation, and for the exchange of information, between competent authorities of the home and of the host member state under this article
- 6 **passporting payment institutions:** Under Article 29, member states are able to require that payment institutions operating on their territory, whose head office is situated in another member state, report to them periodically on their activities in their territories for information or statistical purposes. The EBA will develop a draft RTS related to this
- 7 **access to payment systems:** Article 35 sets out the general access rules for payment systems. In addition to the PSD rules, participants in payment systems designated under the Settlement Finality Directive (SFD) 2009/44 should provide any indirect access services in an objective, proportionate and non-discriminatory manner, and
- 8 **access to accounts:** Under Article 36, credit institutions are now obligated to provide payment institutions with access to payment accounts services on a proportionate, objective and non-discriminatory basis

### III. The role and powers of the competent authority

**3.6** The FCA is expected to continue to undertake ongoing supervision to ensure that payment institutions comply with the prudential requirements of Title II. Title II establishes the expected supervisory procedures for:

- 1 **withdrawal of authorisation:** Under Article 13, the competent authority is required to make public the withdrawal of an authorisation, including in the home member state register and the EBA register
- 2 **registration:** Article 14 stipulates that member states must establish a public register of authorised payment institutions, their agents and branches, and those smaller providers which are waived from the full authorisation requirements under Article 32 and providers of account information services (AIS), which are exempt from authorisation under Article 33. Competent authorities must also notify the EBA of the reasons for the withdrawal of any authorisation and of any exemption related to Article 32 (small payment institutions (SPIs)) or Article 33 (AIS)
- 3 **EBA register:** Under Article 15, competent authorities are required to notify the EBA of the information entered in their public registers, without undue delay, and are responsible for the accuracy of the information

- 4 **exchange of information:** Article 26 sets out the obligation of competent authorities in different member states to co-operate with each other and with other public authorities, which now includes the EBA
- 5 **settlement of disagreements between competent authorities of different member states:** Under Article 27, cooperation between competent authorities should be enhanced, both with regard to the information exchanged and to ensure a coherent application and interpretation of the PSDII, in relation to passporting payment institutions. The EBA is required to assist in resolving disputes between competent authorities in the context of cross-border cooperation and to produce an RTS on cooperation and data exchange
- 6 **right to passport:** Article 28 sets out the home/host responsibilities of competent authorities for passporting firms
- 7 **supervision of passporting payment institutions:** Article 29 sets out the requirements for competent authorities of the home member state and the competent authorities of the host member state to cooperate. The government intends to enable the FCA to require payment institutions to appoint a central contact point in their territory to ensure adequate communication and information reporting on compliance with Titles III and IV
- 8 **non-compliance, including precautionary measures:** Article 30 requires the competent authority of the host member state to inform the competent authority of the home member state without delay when it identifies that a payment institution having agents or branches in its territory does not comply with Titles II, III or IV, and
- 9 **reasons and communication:** Article 31 states that measures taken by the competent authority in relation to Articles 23, 28, 29 or 30 involving penalties or restrictions on passporting should be properly justified and communicated to the payment institution

## **IV. The responsibilities of firms seeking full authorisation**

### **Capital requirements**

**3.7** The capital requirement provisions under the PSDII, which aim to ensure financial stability, largely remain the same as set out in the PSD. Lower requirements have been defined for PSPs providing AIS and PIS in relation to their respective activities and the risks these represent. PSPs providing only PIS are required to have a minimum initial capital and ongoing own fund requirements of €50,000. In addition, PSPs providing AISs and PISs need to hold professional indemnity insurance covering the territories in which they offer services or a comparable guarantee against liability. The EBA will develop guidelines on the criteria to be used by member states to establish the minimum monetary amount.

### **Safeguarding requirements**

**3.8** Article 10 of the PSDII imposes requirements for payment institutions to safeguard funds which are received by the payment institution in the course of executing a payment transaction. As in the PSD, there are two ways of safeguarding: first, depositing the funds in a separate account with a credit institution or investment in “secure, low-risk assets” as defined by the national competent authority as set out in Article 10(1)(a); or second, an insurance policy or comparable guarantee as set out in Article 10(1)(b).

**3.9** The government understands that, in practice, funds are typically safeguarded by deposit with a credit institution. The Bank of England has announced its intention to make settlement accounts available to suitable payment institutions and e-money institutions. The government has therefore updated its implementation of the safeguarding provisions to explicitly permit funds to be deposited with the Bank of England to facilitate direct access to safeguarding accounts. The government has taken this decision in light of the impracticalities for payment and e-money institutions to hold funds at the Bank of England and to hold matching funds with another authorised credit institution in order to meet safeguarding requirements, but there is no expectation that the Bank of England will provide general safeguarding accounts.

#### **Question 7**

Do you agree with the proposed change to safeguarding to ensure funds can be deposited with the Bank of England?

## **V. Access to payment systems and accounts**

**3.10** The PSDII preserves the current access rights for all PSPs in terms of their direct access to certain payment systems and includes additional rules regarding indirect access. The PSDII also introduces new provisions, in Article 36, regarding access to payment account services by payment institutions.

### **Access to payment systems**

**3.11** Article 35(1) maintains the existing rules regarding direct access to payment systems which are not designated under the SFD or are composed exclusively of PSPs belonging to a group, such as a three party card scheme, unless they operate with licensees. Such systems include: Visa, MasterCard, JCB, Diners, China UnionPay, the LINK scheme and three party schemes with licensees operating in the UK. The rules state that access must be provided on a proportionate, objective and non-discriminatory basis, must not restrict access more than necessary to safeguard against specific risks, and must ensure that PSPs can obtain access to certain payment systems to compete effectively in the payments market.

**3.12** Article 35(2) introduces a new requirement that participants in payment systems designated under the SFD should provide any indirect access services in a proportionate, objective and non-discriminatory manner and must not restrict access more than necessary to safeguard against specific risks. In the UK, the systems affected include: Faster Payments, CHAPS Sterling, Bacs and securities settlement systems. The cheque clearing system is also a designated system in the UK but we consider this to be out of scope of Article 35(2) on the basis that the directive only regulates electronic payments and not cheques.

**3.13** The provision in Article 35(2) does not impose an absolute obligation for participants to grant indirect access to all PSPs that request it. The decision to work with a given PSP is still a commercial one, with participants able to take into account cost and risk. However, where a PSP does provide indirect access, it must consider any new applications from other PSPs and take decisions regarding service provision in an objective, proportionate and non-discriminatory manner. The government believes that to achieve this PSPs must:

- have in place appropriate internal processes to be able to consider decisions on providing indirect access services on a case-by-case basis, and
- provide their criteria for indirect access clearly to current and prospective customers

**3.14** The PSR, which has been the regulator for the payment systems industry since April 2015, is currently the competent authority for the enforcement of the access to payment systems provisions in the PSD. It would continue to be the most appropriate UK body to be responsible for Article 35 enforcement in light of its existing powers and objective to promote effective competition in the markets for payment systems and services - between operators and PSPs.

### **Access to payment account services**

**3.15** Article 36 aims to improve payment institutions' access to credit institutions' payment account services so that they can provide their own payment services in an unhindered and efficient manner.

**3.16** The government interprets payment account services to include payment accounts used for the purposes of making payment transactions on behalf of clients, safeguarding accounts, and operational accounts.

**3.17** The provision does not impose an absolute obligation for credit institutions to grant access. The decision to work with a given payment institution is still a commercial one, with credit institutions able to take into account cost and risk.

**3.18** However, it does require credit institutions to ensure that they are providing their services on a proportionate, objective and non-discriminatory basis. The government believes that to achieve this credit institutions must:

- have in place appropriate internal processes to be able to consider decisions on providing payment account services on a case-by-case basis, and
- provide their criteria for access to payment account services to current and prospective customers

**3.19** Where such access is denied, it shall be duly motivated and reasons must be reported to the competent authority.

**3.20** For the enforcement of Article 36, the government proposes co-competency between the FCA and PSR. The FCA will be the nominated authority for the receipt of notifications from credit institutions of refusals of requests for accounts or termination of existing accounts for the purposes of Article 36 and pass notifications to the PSR, as set out in the draft regulations.

#### **Question 8**

Do you agree with the government's proposed approach to access to payment systems and payment account services?

## **iv. Policy options on derogations**

### **Small Payment Institutions**

**3.21** Under the UK's transposition of the PSD, SPIs were able to take advantage of the exemption from the prudential requirements (authorisation conditions, minimum capital and client money safeguarding) and register rather than obtain authorisation from the FCA. This gives exempted entities a strong comparative advantage over authorised providers in the UK ensuring that they can continue to exist and offer niche services.

**3.22** The government intends to implement Article 32 as it did under PSD. The derogation under this provision in the directive provides member states with the option of exempting the application of most of the Title II prudential requirements for firms that:

- do not provide AIS or PIS
- execute less than €3 million worth of payment transactions a month
- do not wish to sell, or “passport” their services in other member states
- can prove that none of the persons responsible for managing the business has been convicted of offences relating to money laundering or terrorist financing or other financial crimes

**3.23** Such persons would be treated as registered, rather than authorised, payment institutions, and would not have the right to passport into other member states. Registered firms are still subject to conduct of business requirements.

**3.24** During the implementation of the PSD, the government assessed that lowering the threshold to €1 million a year would have required a larger number of firms to meet the prudential requirements specified above. This would increase costs for these firms, potentially force some out of business and prevent some new payment institutions from entering the market. In the UK, the majority of firms falling within the exemption criteria are expected to be money transfer companies. Money remitters are currently supervised by HM Revenue and Customs (HMRC) for compliance with the Money Laundering Regulations and will continue to be supervised by HMRC for these purposes following implementation of the PSDII.

**3.25** The UK has already taken action to tighten up rules for SPIs and minimise potential consumer detriment by introducing a ‘Fit and Proper Persons’ test. It is now a condition for registration that an applicant satisfy the FCA that any persons having a qualifying holding in it are fit and proper persons. This means that they must have regard to the need to ensure the sound and prudent conduct of the affairs of the payment institution, and that managers are of good repute and possess appropriate knowledge and experience.

#### **Question 9**

Do you agree with the approach to continue to exercise the SPI exemption, with the same conditions as under the PSD?

# 4 Transparency and information requirements

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**4.1** This chapter sets out the Title III provisions covering Articles 38 to 60, which establish the requirements for the provision of information to a payment service user (PSU):

- I. the objectives of the PSDII the transparency and information requirements
- II. the role of the competent authority
- III. an overview of the requirements
- IV. policy options for member states

## I. Objective of transparency and information requirements

**4.2** Title III sets out harmonised rules on the provision of information to PSUs. These are aimed at ensuring that users across the EU receive the same standards of information about the payment services they receive. This should help to improve the transparency of pricing and service levels between different providers, and encourage further cross-border competition. Under the broader scope of Title III, PSPs will need to update their customer terms and conditions and processes for these payment transactions in order to comply with the information and contract requirements.

## II. Role of the competent authority

**4.3** Titles III and IV of the directive contain the conduct of business rules applicable to all PSPs. Under Article 100, member states are required to appoint competent authorities to ensure and monitor effective compliance with the PSDII. Competent authorities should exercise their powers in accordance with national law, either under their own authority or under the supervision of the judicial authorities or by application to courts which are competent to grant the necessary decision, or where appropriate, by appeal, if the application to grant the necessary decision is not successful. Member states are required to notify the Commission of the designated competent authorities and any division of duties by 13 January 2018.

**4.4** The competent authority would continue to be responsible for considering complaints about alleged infringements of the provisions of national law implementing the provisions of the PSDII. The EBA will produce guidelines on complaints procedures by 13 January 2018.

## III. Overview of the requirements

**4.5** The PSDII conduct of business requirements, concerning information to end users, distinguish between single transactions and ongoing framework contracts. The key changes from PSD include:

- 1 **burden of proof:** Member states, under Article 41, are now required to specify that the burden of proof lies with the PSP to prove that it has complied with the information requirements in Title III
- 2 **single transaction information requirements:** Lower levels of information are required for single transactions under Articles 44 to 49. Additional information requirements to reflect the inclusion of PISPs within the regulatory perimeter mean

the introduction of new disclosure provisions for PISPs for single payment transactions. These include a requirement to provide the identity of a PISP prior to the initiation of a payment transaction; and transparency requirements once a payment order has been initiated

- 3 **information and conditions:** Article 45 sets out the requirements for key information to be provided by the PSP to the PSU. Member states are required to ensure that, prior to initiation, PISPs provide the payer with, or make available to the payer, a specified set of clear and comprehensive information.

Both the PSRs and Consumer Credit Act 1974 (CCA) require the provision of pre-contractual information that must be given to the consumer. In the existing PSRs, where section 55 of the CCA applies, the relevant provisions of the PSRs are switched off, which results in some PSD requirements not being applied for credit cards. The government is proposing to apply the pre-contract information requirements of the PSRs to regulated credit agreements, with the requirements of the PSRs and the CCA cumulatively applicable, but not duplicated

- 4 **PISP information requirements:** Additional information and conditions are placed on PISPs in Article 46. Where a payment order is initiated through a PISP they are required, immediately after initiation, to provide specified data to the payer and, where applicable, the payee. Article 47 states that where a payment order is initiated through a PISP, the reference of the payment transaction should be made available to the payer's account servicing payment service provider (ASPSP)
- 5 **information for the payer and payee:** Under Articles 48 and 49, immediately after receipt of the payment order, a payer's or payee's PSP is required to provide the payer or payee with, or make available to the payer specific data regarding its own services
- 6 **information on additional charges:** Article 60 states that where, for the use of a payment instrument, the PSP or another party involved in a transaction requests a charge, it should inform the PSU prior to the initiation of the payment transaction

**4.6** For transactions covered by a framework contract, the following conditions apply, in addition to the requirements for single transactions:

- 1 **co-badging:** Under Article 52, in the case of co-badged, card-based payment instruments, i.e. the inclusion of two or more payment brands or payment applications of the same payment brand on the same payment instrument, information about the PSU's rights under Article 8 of the Interchange Fee Regulation (IFR) 2015/751 must be provided to the PSU on use of the payment service
- 2 **PSU safeguards:** Member states are required to ensure a secure procedure for notification of the PSU by the PSP in the event of suspected or actual fraud or security threats, under Article 52
- 3 **change in conditions of the contract:** Article 54 states that in relation to any changes in the framework contract or in the information and conditions, set out in Article 52, a PSU has the right to either accept or reject the changes before the date of their proposed date of entry into force. If the changed conditions are not accepted, the contract may be cancelled. The PSU has the right to terminate a contract beforehand and without charge

- 4 **termination of the framework contract:** Termination of the framework contract should be free of charge for the PSU except where the contract has been in force for less than six months. Both the PSRs and CCA require the provision of pre-contractual information that must be given to the consumer, except where section 55 of the CCA applies and the PSRs are switched off. The draft regulations (in Annex B) clarify these overlapping provisions by applying pre-contract information requirements of the PSRs to regulated credit agreements, with the expectation that these information provisions are cumulatively applicable, but not duplicated, and
- 5 **information on individual transactions:** Articles 57 and 58 confirm that, after the transaction, the provider shall provide the same information that is required for single transactions. However, a framework contract may include a condition that the information is provided or made available periodically, at least once a month. member states may require that PSPs provide information on paper or on another durable medium once a month, free of charge

**4.7** Currently, the PSRs do not give a right of termination for regulated credit agreements. A similar right appears for such agreements in the CCA, but this does not extend to overdrawn current accounts. The government is considering whether to extend the right of termination in the PSRs to all situations where the right of termination in the CCA does not apply. This would give a customer a right to terminate the framework contract (i.e. switch current accounts) even while in overdraft and require PSPs to rely on contract rights to recover the debt. There is already a market practice for this through the Current Account Switching Service, which allows customers to switch current accounts even if the account is overdrawn.

#### **Question 10**

Do you agree that the government should extend the right of termination to overdrawn current accounts?

## **IV. Policy options on derogations**

### **Micro-enterprises**

**4.8** Under Article 38(2), member states may provide for provisions in Title III to be applied to micro-enterprises in the same way as to consumers. Micro-enterprises are defined in Commission Recommendation 2003/361/EC as businesses that have an annual turnover and/or annual balance sheet total of less than €2 million, and fewer than 10 employees.

**4.8.1** The effect of exercising this option is that, where the PSU's contracting party is a micro-enterprise, all of the Title III provisions will apply. Were the use of this option not to be carried over to the PSDII, some PSPs could agree with micro-enterprises that certain types of information under Title III will not be provided. This would risk micro-enterprises being charged for information provision by their PSPs, a factor that might restrict their use of certain payment methods. The government therefore proposes to maintain the provisions of Title III as compulsory where the PSU is a micro-enterprise.

### Question 11

Do you agree that the Title III provisions should continue to apply to transactions involving micro-enterprises in the same way as those involving consumers?

## Low-Value payment instruments and e-money

**4.8.2** Low-value payment instruments should be a cheap and easy-to-use alternative in the case of low-priced goods and services and should not be overburdened by excessive requirements. A lighter regime for relevant information requirements and rules on the execution of low-value payments was adopted under the PSD, which is limited to essential information, taking into account the technical capabilities expected of instruments dedicated to low-value payments. PSUs are expected to have adequate protection, taking into consideration the limited risks posed by low-value payment instruments, in particular prepaid payment instruments, as highlighted in recital 81 of the PSDII.

**4.8.3** Article 42(1) allows providers of low-value and/or e-money payment instruments to agree with PSUs a derogation from some of the information provisions in the PSDII. The derogation can be exercised if such instruments are used as part of a framework contract and:

- are used to make individual transactions not exceeding €30
- have a spending limit of €150
- have stored funds which do not exceed €150 at any time

**4.8.4** Article 42(1)(b) also gives PSPs the option to change contractual conditions on a low-value payment instrument more quickly than on traditional framework contracts. It is a commercial decision for PSPs to make on whether to exercise this flexibility, which applies to both national and cross-border transactions.

**4.8.5** Member states have the flexibility to adapt the thresholds set out in Article 42(1) in line with national payment markets. Under Article 42(2), member states may reduce or double these thresholds for national payment transactions, and increase the thresholds to €500 for pre-paid instruments. Some card companies may set a limit on how much money you can load onto your card at any one time, but have no limit per transaction.

**4.8.6** The UK therefore has the option of increasing the thresholds in order to maintain incentives for providers of low-value payment instruments and ensure a lower, more proportionate administrative burden. The government intends to maintain the use of the flexibility, as under the PSD, which doubled the €30 and €150 thresholds to €60 and €300, and increased the limit for prepaid instruments to a stored value of €500 (for intra-UK transactions only, which is all that the option allows).

### Question 12

Do you agree with the government's proposal to maintain the thresholds set for low-value payment instruments in the PSRs?

## Monthly statements

**4.9** With the development of digital channels since the implementation of the PSD, many consumers currently have access to products and services online and are able to view their transactions and statements, often with the option to save or print statements. Some credit institutions have moved away from providing monthly statements on paper, relying on customers being able to access their account information online, with some reducing the frequency of statements. The government takes the view that customers must be able to easily access clear and transparent information about their accounts in order to understand their financial position (and, in particular, any fees or charges that may apply on their account).

**4.10** Articles 57 and 58 of the PSDII allow for the option of providing monthly statements, with Article 57(2) giving the choice to PSUs and Article 58(2) giving PSPs a choice, as part of a framework contract. Articles 57(3) and 58(3) also include an option for member states to require that PSPs provide information on their transactions to payees and payers at least once a month, on paper or another durable medium.

**4.11** The government is considering whether to exercise the member state option to require that PSPs provide information on their transactions to payers and payees at least once a month, on paper or on another durable medium. This would maintain and confirm common practices and would reduce the burden on consumers and businesses who would otherwise need to request to receive monthly statements, in place of the default position which would mean PSPs providing payers and payees with a statement for every transaction. Exercising the option would have a positive impact on consumers by proactively providing consumers with information about their financial position, which is key part of the Competition and Market Authority's (CMA) remedies in its retail banking market investigation.

**4.12** The PSRs contain rules on the provision of statements to customers. In the current regulations, regulation 41 switches off the provisions where section 78 of the CCA and the Consumer Credit (Running Account Credit Information) Regulations 1983 apply, which require regular statements for overdrafts. However, the PSDII requirements may not be met fully by this approach. The draft regulations clarify the interaction between the PSRs and the CCA so that requirements in the PSRs would apply in parallel to transparency obligations under CCA and ensure that statements are provided at least monthly to payers where they are overdrawn. The requirements are cumulatively applicable, without the need for duplication.

### Question 13

Do you think PSPs should be required to provide monthly statements to payers and payees?



# 5 Conduct of business rules

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**5.1** Title IV of the directive contains the conduct of business rules applicable to all PSPs, including credit institutions, e-money issuers, and authorised and registered payment institutions.

**5.2** The majority of these conduct of business rules are identical to those in the PSD. However, the PSDII does introduce an entirely new set of rights and obligations related to the delivery of “third party” services. These are discussed in more detail in Chapter 6, while this chapter covers the remaining provisions within Articles 61 to 103 of the directive and sets out:

- I. the objectives of the PSDII conduct of business rules
- II. the role of the competent authority
- III. an overview of the requirements
- IV. policy options for member states

## I. Objectives of the conduct of business rules

**5.3** Title IV sets out harmonised rules on the rights and obligations of PSPs and users. These relate to authorisation and execution procedures for payment transactions, value dating and provider-user liabilities. They aim to provide customers with greater certainty about the way payments will be executed and what happens in the event of a transaction going wrong.

**5.4** As with Title III, the conduct of business rules in Title IV have been extended to include payment transactions in all currencies, where the PSPs for the payer and recipient are located in the European Union, and the EU part of ‘one-leg’ transactions where at least one PSP is located within the Union.

## II. Role of the competent authority

**5.5** The broad aim is that the home competent authority should deal with complaints against the firm in relation to Titles III and IV. Whilst the requirements remain broadly the same as under the PSD, the directive introduces a new requirement that competent authorities have a public disclosure power, except where such disclosure would jeopardize the financial markets or cause disproportionate damage to the parties involved. The FCA already has the relevant regulatory powers.

**5.6** Article 99 of the PSDII requires competent authorities to maintain a complaints system in relation to alleged infringements of any aspect of the directive; the FCA and PSR will continue to have in place procedures for the submission of complaints. The EBA will issue guidelines to the competent authorities on the complaints procedures that need to be considered in order to meet the requirement to monitor effective compliance with the PSDII.

**5.7** Article 100(4) clarifies that in the event of an infringement or suspected infringement of the PSDII transparency and conduct of business rules, the relevant competent authorities shall be those of the home member state of the provider (except for agents and branches conducted under the right of establishment where the competent authority is that of the host member state).

### III. Overview of the requirements

5.8 Title IV addresses the authorisation procedures for payments, refunds and liability for unauthorised or incorrect payments, procedures for execution, and value dating. Key provisions and changes from the PSD include:

- 1 **charges levied by the PSP:** Any charges applied shall not exceed the direct costs borne by the payee for the use of the specific payment instrument. Member states should consider preventing payees from requesting charges for the use of payment instruments regulated through the IFR
- 2 **low-value payment instruments:** Article 63 offers member states an option to derogate from certain conduct of business rules that PSPs may agree with their PSUs in the case of low-value payment instruments issued under a framework contract
- 3 **availability of funds:** Under Article 65, a PSP issuing card-based payment instruments, which does not hold the customer's payment account, is entitled to obtain confirmation of availability of funds on a payer's account from the ASPSP, subject to a customer's explicit consent and conditions being met. Confirmation does not allow the ASPSP to block funds on the payer's payment account
- 4 **obligations of providers and users:**
  - Article 69 confirms that users must notify their PSPs once they become aware of theft, loss or misappropriation of a payment instrument. PSUs are entitled to use an instrument in accordance with objective, non-discriminatory and proportionate terms governing the issue and use of the payment instrument, and
  - Article 70 confirms that PSPs are obliged to keep personalised security credentials safe in order to protect the funds of the PSU and to limit the risk of fraud and unauthorised access to the payment account. The PSP shall bear the risk of sending a payment instrument or any personalised security credentials relating to it to a PSU
- 5 **unauthorised/incorrect transactions:** Articles 71 and 72 set out the notification and rectification requirements in the event of unauthorised/incorrectly executed transactions.

The draft regulations (in Annex B) extend the provision whereby PSPs are able to block or unblock payment instruments to all situations where the equivalent provision in section 98A of the CCA does not apply. This ensures that there are provisions covering overdrafts, which are not covered by the equivalent provision in section 98A of the CCA and are not currently covered by the PSRs. The draft regulations also extend provision for unblocking or replacement of payment instruments to cover regulated credit agreements

- 6 **liabilities of providers and users:** Article 73 states that PSPs must immediately refund the amount of an unauthorised transaction restoring a debited account to its previous state
- 7 **payer's liability for unauthorised payment transactions:** Article 74 sets out a payer's obligation to bear the losses, up to a maximum of €50, relating to any unauthorised payment transactions. Where a payer's PSP does not require SCA, the payer shall not bear any financial losses unless a payer has acted fraudulently.

Where the payee or their PSP fails to accept SCA, it shall refund the financial damage caused to a payer's PSP

- 8 **refunds:** Article 75 relates to blocking of funds on a card-based payment account when the transaction amount is not known in advance. Where such payment transactions are initiated by or through the payee and the exact amount is not known when consent to execute is given, the payer's PSP should be able to block funds on the payer's payment account if the payer has given consent to the exact fund amount. Funds should be released without undue delay after receipt of information about the exact transaction amount after receipt of the payment order
- 9 **refunds for payment transactions initiated by or through a payee:** Article 76 gives member states the option to require their PSPs to offer more favourable refund rights to the payer according to their direct debit schemes. This does not prevent industry from applying more favourable rights to consumers and the government does not intend to apply additional requirements on PSPs and encourages industry to maintain the current level of customer protection for direct debits
- 10 **requests for refunds for payment transactions initiated by or through a payee:** Article 77 states that payers must be able to request an unconditional refund during a period of eight weeks from the date when the funds were debited. This contrasts with the unlimited Direct Debit Guarantee currently operated by UK banks and building societies that take part in Direct Debit Scheme, but the eight week limit is not incompatible with the longer guarantee provided by industry
- 11 **incorrect unique identifiers:** Under Article 88, a payer's PSP is already required to make reasonable efforts to recover the funds involved in the payment transaction, where unique identifier provided by the PSU is incorrect. A payer's PSP is required to provide to the payer, upon written request, all information available to the payer's PSP and relevant to the payer in order for the payer to file a legal claim to recover the funds
- 12 **PSPs' liability for non-execution, defective or late execution of payment transactions:** Liability for correct payment execution lies with a payer's PSP, under Article 89. The PSP of a payer should, where the full amount is not credited or is credited late to the payee's PSP, correct the payment transaction or without undue delay refund the payer
- 13 **right of recourse:** PSPs and intermediaries taking part in a payment transaction, are required to ensure that a non-responsible party is compensated for losses incurred or sums to pay relating to liability, including where any PSP fail to use SCA, in Article 92
- 14 **data protection:** Under Article 94, PSPs should only be able to access, process and retain personal data for the provision of payment services, with the explicit consent of the PSU
- 15 **management of operational and security risks:** Article 95 requires PSPs to establish a framework with mitigation and control measures to manage operational and security risks, relating to the payment services they provide. The EBA will issue guidelines on the criteria and conditions for establishing and monitoring security measures
- 16 **incident reporting:** Article 96 requires PSPs to notify the FCA without undue delay of any major operational or security incident. The EBA will issue guidelines to PSPs

on the classification of major incidents and on the templates and procedures for notification and competent authorities on the criteria for assessing incidents and the details to be shared with other domestic authorities. If customer financial interests are affected, the PSP is required to inform and advise them on mitigation measures

- 17 **Strong Customer Authentication:** Article 97 requires that SCA be used for accessing a payment account online; initiating a payment transaction; and carrying out a transaction through a remote channel. The EBA is developing a draft RTS on SCA
- 18 **competent authorities:** Under Article 100 the EBA will issue guidelines to competent authorities on the complaints procedures for monitoring compliance with the PSDII
- 19 **dispute resolution:** Article 101 requires member states to ensure that PSPs put in place an effective complaints procedure before a dispute is referred to an Alternative Dispute Resolution (ADR) procedure or brought before a court. In relation to complaints which are eligible for referral to the FOS, these requirements will be reflected in FCA rules on dealing with complaints. The draft regulations set out the requirements for complaints that would not be eligible for referral to the FOS. There is a requirement for PSPs to reply to complaints within 15 business days and provide a final response within 35 business days, and to inform complainants about an available ADR option, and
- 20 **ADR procedures:** Article 102 requires firms to ensure the availability of ADR procedures in relation to Titles III and IV. Such a system already exists in the form of the FOS and the government intends to implement Article 102 through the existing mechanism in place. Article 61(2) permits member states to choose not to implement Article 102 for users that are not consumers, and on this basis the government does not intend to extend access to the FOS for businesses that would not usually have such access. This is discussed further below

## Transitional provisions

**5.9** Under Article 109, authorised payment institutions that started providing payment services under the PSD before 13 January 2018, may continue carrying out those activities until 13 July 2018 without needing authorisation under the PSDII, and without needing to comply with the other provisions in Title II of PSDII. By that date, such payment institutions must submit information to the competent authority about their compliance with the requirements of Title II of the PSDII, and if they comply with the requirements they should be granted authorisation under the PSDII.

**5.10** As an exception to that general position, payment institutions authorised under the PSD to execute payment transactions where the payer's consent is given by means of a telecommunication, digital or IT device for payment to the system or network operator acting as intermediary between the payer and the supplier of the goods or services, retain that authorisation for the provision of those payment services other than where the funds are covered by a credit line. However, that authorisation only continues beyond 13 January 2020 if the competent authority has evidence that the institution complies with the PSDII requirements on initial capital and own funds.

**5.11** SPIs who provided services under the PSD before 13 January 2018, may continue carrying out those activities within the member state concerned until 13 January 2019 without needing authorisation or registration under the PSDII, and without needing to comply with the other

provisions in Title II of PSDII. However, in relation to Article 95 and 96, SPIs would be expected to submit at a minimum the detail required in Article 5(f) and (i). Such payment institutions must be authorised or registered under PSDII to continue providing payment services from that date.

## IV. Policy options on derogations

### Micro-enterprises

**5.12** As in Title III, member states may provide, under Article 61(3), that Title IV provisions applicable to consumers will also be mandatory for PSUs that are micro-enterprises. For the reasons given in the discussion of Title III, the government's preferred approach is to exercise this option in order to provide micro-enterprises with the same standards as individual consumers. The definition of micro-enterprises has ramifications for which businesses have access to the out of court redress procedures for disputes between PSUs and their providers arising from the rights and obligations of the directive.

**5.13** Article 61(2) provides that member states may choose not to extend access to out of court redress procedures for PSUs that are not consumers. Assuming that stakeholders agree with the government's intention to extend Title IV provisions to micro-enterprises, exercising the option in Article 61(2) would mean that out of court redress procedures apply where the PSU is a consumer or a micro-enterprise. This is the current mechanism in place which the government proposes to retain.

**5.14** Smaller businesses have access to FOS in the same way as consumers do, whereas larger businesses do not. This is on the assumption that larger businesses are more likely to have the financial wherewithal to lodge a claim in the Courts, where they have grounds to do so. However, it is worth noting that the FCA are expected to consult on widening the remit of the FOS from a "micro-enterprise" threshold to a "small business" threshold. This would be implemented by FCA rules, and it will be for FCA to decide on eligibility.

#### Question 14

Do you agree with the government's proposal to provide access to out-of-court procedures (in the form of the FOS) only where the complainant would usually be eligible to refer a complaint to the FOS?

### Surcharging

**5.15** Surcharges are additional fees applied by merchants to payment transactions on top of the cost of the item being purchased. Under the PSD, merchants were allowed to request from the payer a surcharge, offer them a discount for particular payment types or steer them towards the use of the most efficient payment means.

**5.16** The PSDII introduces a default prohibition on surcharging for payment instruments for which interchange fees are capped under Chapter II of the IFR. This will include most consumer debit and credit cards, but excludes three-party card scheme payment instruments and commercial cards. It also introduces a prohibition on surcharges which exceed the direct costs to the payee.

**5.17** Under the PSDII, as under the PSD, member states have the option to prohibit or limit the right of the payee to request charges, taking into account the need to encourage competition

and promote the use of efficient payment instruments. The UK does not currently use the flexibility to prohibit retailers from charging customers to accept a particular type of payment instrument and does not currently propose to extend the prohibition as part of the implementation of the PSDII. However, the government welcomes input on whether a wider prohibition on surcharging would be in the interests of ensuring a level playing field for different payment instruments and encouraging competition in the payment services market.

**5.18** The PSR or FCA are not best placed to monitor compliance with this obligation as they do not have existing channels through which they interact with, nor powers over, the majority of retail businesses. The supervision of compliance of this kind is closer to the enforcement activity currently undertaken by Trading Standards bodies, including Trading Standards' role in monitoring the obligations on merchants to display clearly to their customers which cards they accept under the IFR, and the restrictions on surcharging contained within the Consumer Rights (Payment Surcharges) Regulations 2012. The CMA will also have a role in relation to their co-current consumer protection role in relation to the Consumer Rights (Payment Surcharges) Regulations 2012.

**5.19** The government therefore intends to assign the supervisory role to Trading Standards and the CMA, and envisages that oversight of this provision will be monitored through complaints made to local Trading Standards offices; this will ensure that there is sufficient yet proportionate regulatory oversight.

#### **Question 15**

Do you agree that the prohibition on surcharging should be limited to payment instruments regulated under Chapter II of the IFRs?

### **Low-Value payment instruments and e-money**

**5.20** Mirroring the derogation in Article 42 in Title III, Article 63 provides flexibility for providers of low-value payment instruments and e-money. The derogation has not changed from the PSD and Article 63(1) enables providers to agree with their users that some of the Title IV requirements shall not apply in certain circumstances, and where the payment instrument concerned:

- is used to make individual transactions not exceeding €30
- has a spending limit of €150
- has stored funds not exceeding €150 at any time

**5.21** As with Article 42, PSPs will need to investigate the different thresholds applied in different member states and may decide commercially to offer their products only in countries with similar thresholds. As argued in relation to the parallel Title III provision, and from the perspective of the UK market, the government proposes to exercise the full flexibility afforded to member states by Article 63(2), as it did under the PSD.

### Question 16

Do you agree with the proposal to maintain the thresholds set for low-value payment instruments under the PSRs?

### Liability for unauthorised use

**5.22** In the event of an unauthorised transaction, both provider and payer are expected to bear some level of risk for liability for the losses involved; a €50 maximum is set in cases where the payer has not acted fraudulently, or with gross negligence. Where the payer has acted fraudulently or with gross negligence, the payer faces unlimited liability. The €50 is a reduction from the €150 set out in the PSD and from the £50 currently in UK law through the use of the derogation in the implementation of the PSD.

**5.23** The PSDII maintains the derogation so that member states have the option to reduce the €50 maximum. The government favours maintaining at least existing UK standards of customer protection, while guarding against the risk of moral hazard. The government proposes to reduce the maximum liability from £50 to £35, to ensure broad consistency with the maximum in the PSDII.



# Account Information Services and Payment Initiation Services

## 6

**6.1** Title IV of the directive introduces entirely new provisions to payment services legislation in the form of rights for payers to use “third party” firms providing AIS and payment initiation services (PIS).

**6.2** This chapter of the consultation document, covering provisions appearing in various Articles from 61 to 98 of the directive, sets out:

- I. the objectives of the AIS and PIS access rules
- II. the role of the competent authority
- III. an overview of the requirements
- IV. the proposed approach to implementation

### I. Objectives of the third party provider access rules

**6.3** The regulation of “third party” payment services for the first time under the PSDII recognises recent changes to the payments market where such services are becoming increasingly popular with payers and other end users.

**6.4** As these activities are not currently regulated payment services there are only limited amounts of consumer protection in place (related to more general consumer and data protection legislation). Requiring that firms offering these services be registered or authorised, depending on the service being offered, and therefore meet certain security, risk management, transparency and other standards, will ensure that users are protected and treated fairly.

**6.5** In addition, the requirement that ASPSPs - PSPs, who provide and maintain payment accounts for a payment user - must provide access to online payment accounts to AISP or PISP will secure payers' and other end users' rights to use “third party” services. This will in turn strengthen competition in the payments and wider account information services market.

**6.6** In the UK, the PSDII obligations are closely aligned with the government's vision for enhanced competition in the retail banking market through the delivery of an Open Banking Standard. In 2015, HM Treasury asked industry to look at how an Open Banking Standard could be delivered. The Open Banking Working Group published their report in January 2016.

**6.7** Following this, as part of its retail banking market investigation, the CMA included in its final remedies published on 9 August 2016 a requirement for nine banks across Great Britain and Northern Ireland, working with other ASPSPs and current and potential “third party” providers to deliver an Open Banking Application Programming Interface (API) Standard. The CMA make clear that this API Standard will need to align with the PSDII, requiring banks to deliver it by January 2018 when the PSDII comes into effect.

**6.8** Within the PSDII context, the Open Banking API Standard is expected to provide the framework for how AISP and PISP software authenticates, accesses data, and initiates payments with an ASPSP.

**6.9** This approach is expected to provide a mechanism for implementing best practice when it comes to user consent and authentication, including:

- users providing login details to authenticate their identity only to their account provider
- users being given a clear view of what information is being shared with AISPs, or what functionality opened up to PISPs, when using their services

**6.10** The government therefore sees the PSDII implementing regulations as providing the legislative foundations on which the Open Banking API Standard then sits. Although APIs are only one method by which ASPSPs could provide the access to AISPs or PISPs mandated under the PSDII, the government believes a commonly utilised API framework will lead to greater competition in the retail banking and “third party” services market and better outcomes for payers and other end users.

**6.11** In line with this, although the CMA remedy is limited to current accounts, including all payment accounts within the initial development of the Open Banking API Standard would allow the competition and coordination benefits to be shared more broadly across a wider range of account types and services.

**6.12** Furthermore, as part of this work, the nine banks and broader industry may also consider cooperating on other elements of access solutions, such as mechanisms for liability management and dispute resolution between ASPSPs and AISPs or PISPs.

## **II. Role of the competent authority**

**6.13** In line with current authorisation arrangement for payment institutions, the government believes that the FCA should undertake the role of registering and authorising AISPs and PISPs, and ensuring that ASPSPs, AISPs and PISPs are meeting their obligations under the legislation. As part of this, ASPSPs must notify the FCA where access is denied to AISPs or PISPs.

**6.14** While the FCA would monitor compliance, it will be up to industry to put in place suitable arrangements that allow firms to meet the requirements of the legislation, such as appropriate processes to manage liability arising from unauthorised transactions initiated through a PISP or dispute handling between an ASPSP and PISP.

## **III. An overview of the requirements**

**6.15** Further to Chapter 5, Title IV provisions relating to third party providers cover:

- 1 **Professional indemnity insurance (PII):** As part of their authorisation requirements under the directive, providers of PIS and AIS will be required to hold PII or a comparable guarantee against liability, covering the territories in which they offer services. The EBA will publish RTS guidelines and regularly review these
- 2 **Consent:** Article 64 provides that a transaction is considered authorised if a payer has given consent to the transaction in the form agreed with the PSP, which may be via either the payee or the PISP

- 3 **Access to payment accounts:** Article 66 and 67 set out the rights for payers to use AISP or PISP to access services where their payment account is accessible online, and places requirements on ASPSPs, AISPs and PISPs
- 4 **Limits of access to payment accounts:** Article 68 stipulates that ASPSPs may deny AISP or PISP access to a payment account for objectively justified and duly evidenced reasons relating to unauthorised or fraudulent access to the payment account or initiation of a payment transaction. ASPSPs are required to inform the payer of the reasons for the denial of access and immediately report the action to the competent authority
- 5 **Unauthorised/incorrect transactions:** Article 71 states that where a PISP is involved in an unauthorised or incorrect transaction, the PSU shall obtain rectification from the ASPSP, and
- 6 **Liabilities of providers and users:** Article 73 states that where an unauthorised transaction is initiated through a PISP, the ASPSP shall still be responsible for refunding the payer. Where the PISP is liable for the unauthorised payment transaction, it will immediately compensate the ASPSP, with Article 72 setting out that the burden of proof falls on the PISP to prove that it was not at fault

## IV. Proposed approach to implementation

### Consent, authentication and communication

#### Consent

**6.16** The PSDII, and the proposed draft implementing regulations, are clear that where a payer is using an AIS or PIS, explicit consent must be obtained by the AISP or PISP for the service or payment transaction in question. The authorisation of a payment transaction does not have to be given by the user directly to the ASPSP but can be given only to the PISP.

#### Authentication

**6.17** Authentication shall be conducted in line with the implementing regulations and with the EBA RTS. In the case of payment transactions initiated through a PISP, the PISP is responsible for ensuring that all information is transmitted to the ASPSP.

**6.18** Best practice is expected to involve customers authenticating themselves directly with their ASPSP, i.e. providing their payment account login details only to their ASPSP, rather than to the AISP or PISP, with confirmation of access then provided by the ASPSP back to the AISP or PISP. This mechanism will limit risk to payers and other end users and is expected to form a part of the Open Banking API Standard.

**6.19** Subject to the EBA RTS, the government expects an AISP will be able to access the information contained within the payment account held by an ASPSP on both a one-off and ongoing basis. Ongoing basis means that users will be required to authenticate their identity once and then, with appropriate consent, the AISP will continue to be able to access their information even after the user's immediate session has ceased. ASPSPs are expected to allow for regular communication sessions with the AISP, but not necessarily to provide an uninterrupted data stream.

**6.20** Subject to the EBA RTS, the government expects the initiation of transactions through a PISP to require authentication each time a payment is initiated.

## Communication

**6.21** The EBA RTS on SCA and secure communication will set out further details on the requirements for any communication between AISPs/PISPs and ASPSPs.

### Question 17

Do you agree with the proposed approach to consent, authentication and communication?

## Scope

### Online payment accounts

**6.22** Users will have the right to use AISPs and PISPs in relation to all online payment accounts. Online is taken to mean any account which is accessible by the user on the internet through any device, including a computer, a mobile phone, or an application on a mobile phone.

**6.23** The following types of accounts likely to fall within the definition:

- personal current accounts
- business current accounts
- credit card accounts
- flexible savings accounts
- e-money accounts

**6.24** This definition goes broader than the CMA remedy, which applies only to personal and business current accounts. However, as the CMA note, there is likely to be value in including all payment accounts within the development of the Open Banking API Standard.

### Account information service access

**6.25** ASPSPs are expected to provide to an AISP access to the same information regarding a payment account as is available to the user when accessing their account online directly with the ASPSP. This could include:

- account information, such as name on the account, address of the account holder, account number
- product details, such as the product type, interest rate when in credit, overdraft amount, interest rate when overdrawn
- transaction data to the same level of granularity and covering the same time periods as is available to the end user online

### Payment initiation service access

**6.26** ASPSPs are expected to provide to a PISP access to the same functionality that is available to the user when accessing their payment account online directly with the ASPSP. For the majority of online payment accounts this is likely to include credit transfers and the establishment of standing orders, but not the establishment of direct debit mandates if this is not already available to the user online.

### Question 18

Do you agree with the information and payment functionality that will be available to AISP and PISPs?

## AIS and PIS business models in scope

**6.27** The government reads the definition of PIS and AIS in the directive (Article 4(15) and 4(16)) broadly.

**6.28** The government interprets the definition of AIS as meaning that an AISP uses some or all of the information from one or more payment accounts held by the PSU with one or more ASPSPs, to provide an information service.

**6.29** The government expects these services to include, though not be limited to:

- dashboard services that show aggregated information across a number of payment accounts
- price comparison and product identification services
- income and expenditure analysis, including affordability and credit rating or credit worthiness assessments, and
- expenditure analysis that alerts users to consequences of particular actions, such as breaching their overdraft limit

**6.30** These services are expected to typically be standardised across multiple users, with standard terms and conditions. However, it may be possible that some bespoke services currently provided to individuals and firms, such as accountancy or legal services, may be included within the broad reading of Articles 4(15) and 4(16). The government would like to receive input on what services may be brought into scope by the proposed approach.

### Question 19

Do you agree with the government's interpretation of the definition of AIS and PIS?

### Question 20

What services are currently provided that you think may be brought into scope of the PSDII by the broad reading of the definition of AIS and PIS?

## Rights and obligations

### Rights of access

**6.31** ASPSPs are expected to provide unhindered access to AISPs and PISPs providing a service to a user with a payment account held with the ASPSP, subject to the implementing regulations and EBA RTS on authentication and communication.

**6.32** AIS and PIS access should be available to a user whenever they can access their payment account online directly with the ASPSP. As such, if the user can access their payment account online 24 hours a day, 7 days a week (excluding scheduled maintenance or system failures) then the ASPSP should be providing access to AISPs and PISPs on the same terms.

**6.33** It is necessary to balance the rights for users to use AIS and PIS (and therefore those providers to have access to users' accounts) with the cost to ASPSPs of providing secure access. ASPSPs only have to provide one mechanism for access, as such, the government believes that the best way of achieving this is through the Open Banking API Standard, provided it meets the requirements of the implementing regulations and EBA RTS.

### Consumer protection

**6.34** The proposed PSDII implementing regulations set out a number of constraints on AISPs and PISPs in order to ensure that end users are protected and their data is not misused. Alongside these requirements, AISPs and PISPs will need to adhere to other relevant consumer and data protection legislation, such as the EU General Data Protection Regulation, which comes into force in May 2018.

### Liability

**6.35** Where an unauthorised transaction occurs, including when it has been initiated through a PIS, ASPSPs will be responsible for refunding a user immediately. The exception is where there are reasonable grounds for suspecting fraud which the ASPSP believes needs further investigation. As under the PSD, PSPs will be expected to quickly resolve any investigation so that payers that have not engaged in any fraudulent activity can be refunded immediately.

**6.36** Where the PISP is liable for the unauthorised payment transaction, it will immediately compensate the ASPSP. The refund for the payer will be unaffected and the burden of proof falls on the PISP to prove that it was not at fault. It is up to industry to develop appropriate mechanisms so that ASPSPs can work effectively with PISPs, including on mechanisms for resolving any disputes. Industry may find it helpful to include the development of such mechanisms alongside the work on the Open Banking API Standard.

#### Question 21

Do you agree with this description of the rights and obligations for ASPSPs, AISPs and PISPs?

### Initial implementation

**6.37** The government's implementing legislation will come into force on 13 January 2018, including the requirements around access set out in article 66 and 67. However, provisions related to security in articles 65, 66, 67 and 97 will not come into force until 18 months after

the EBA RTS on SCA and secure communication are in force. As such, these provisions are not expected to be in force before autumn 2018.

**6.38** During this initial period ASPSPs will be expected to provide access to AISPs and PISPs from January 2018 and, as industry will have had sight of the draft RTS, the government would expect this to be done in line with the draft RTS wherever possible.

**6.39** During this period both ASPSPs and AISPs/PISPs will be undergoing a learning process and will be expected to work closely across industry, and where appropriate with the FCA, to overcome challenges that emerge and ensure that users have the ability to use AIS or PIS.

#### **Question 22**

Do you have any comments on the initial period of implementation, before the EBA RTSs are fully in force?



# A Consultation questions and how to respond

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## Summary of questions

- **Question 1:** Do you agree with the government's proposed approach to implementation of the PSDII? Bearing in mind the maximum harmonising nature of the PSDII, do you think the structure of the regulatory regime will allow the UK's competent authorities to enforce the regulations in a fair and equal way towards all payment service providers?
- **Question 2:** A consultation stage impact assessment of the proposed changes will be published before the end of the consultation. Do you have any comments on the impact of the PSDII set out in the impact assessment?
- **Question 3:** Do you agree that the government should continue to exempt the institutions listed above from the PSDII?
- **Question 4:** If you intend to make use of the electronic communications networks and services exemption, how do you intend to track the €50 and €300 spending limit?
- **Question 5:** Is the approach on cascading useful to intermediaries given the limits on the exemption and the potential need for authorisation or registration for other services provided? What types of business models would benefit?
- **Question 6:** Do you agree with the government's interpretation of the limited network and commercial agent exemptions? Which business models do you think may now be brought into scope that were previously exempt?
- **Question 7:** Do you agree with the proposed change to safeguarding to ensure funds can be deposited with the Bank of England?
- **Question 8:** Do you agree with the government's proposed approach to access to payment systems and payment account services?
- **Question 9:** Do you agree with the approach to continue to exercise the SPI exemption, with the same conditions as under the PSD?
- **Question 10:** Do you agree that the government should extend the right of termination to overdrawn current accounts?
- **Question 11:** Do you agree that the Title III provisions should continue to apply to transactions involving micro-enterprises in the same way as those involving consumers?
- **Question 12:** Do you agree with the government's proposal to maintain the thresholds set for low-value payment instruments in the PSRs?
- **Question 13:** Do you think PSPs should be required to provide monthly statements to payers and payees?

- **Question 14:** Do you agree with the government's proposal to provide access to out-of-court procedures (in the form of the FOS) only where the complainant would usually be eligible to refer a complaint to the FOS?
- **Question 15:** Do you agree that the prohibition on surcharging should be limited to payment instruments regulated under Chapter II of the IFRs?
- **Question 16:** Do you agree with the proposal to maintain the thresholds set for low-value payment instruments under the PSRs?
- **Question 17:** Do you agree with the proposed approach to consent, authentication and communication?
- **Question 18:** Do you agree with the information and payment functionality that will be available to AISPs and PISPs?
- **Question 19:** Do you agree with the government's interpretation of the definition of AIS and PIS?
- **Question 20:** What services are currently provided that you think may be brought into scope of the PSDII by the broad reading of the definition of AIS and PIS?
- **Question 21:** Do you agree with this description of the rights and obligations for ASPSPs, AISPs and PISPs?
- **Question 22:** Do you have any comments on the initial period of implementation, before the EBA RTSs are fully in force?

## How to respond

**A.1** The government invites responses on the specific questions raised. The questions can be found throughout the document and are also listed in full below.

**A.2** This consultation will close on 16 March 2017.

**A.3** Responses can be sent by email to: [PSD2consultation@HMTreasury.gsi.gov.uk](mailto:PSD2consultation@HMTreasury.gsi.gov.uk). Alternatively, they can be posted to:

EU Payment Services Directive II Consultation  
Banking and Credit Team  
HM Treasury  
1 Horse Guards Road  
London SW1A 2HQ

**A.4** When responding please say if you are a business, individual or representative body. In the case of representative bodies, please provide information on the number and nature of individuals or firms that you represent.

## Confidentiality

**A.5** Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1988 (DPA) and the Environmental Information Regulations 2004.

**A.6** If you want the information that you provide to be treated as confidential, please be aware, under the FOIA, there is a statutory Code of Practice with the public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury.

**A.7** HM Treasury will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## **Consultation Principles**

**A.8** This consultation is being run in accordance with the government's Consultation Principles. The government will be consulting for 6 weeks. This is in order to give stakeholders adequate time to respond while also ensuring that government is able to meet industry's concern to have the UK approach to the implementation of this directive finalised as soon as possible.

**A.9** The Consultation Principles are available on the Cabinet Office website:  
<https://www.gov.uk/government/publications/consultation-principles-guidance>



## **HM Treasury contacts**

This document can be downloaded from  
[www.gov.uk](http://www.gov.uk)

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