

REPRINT

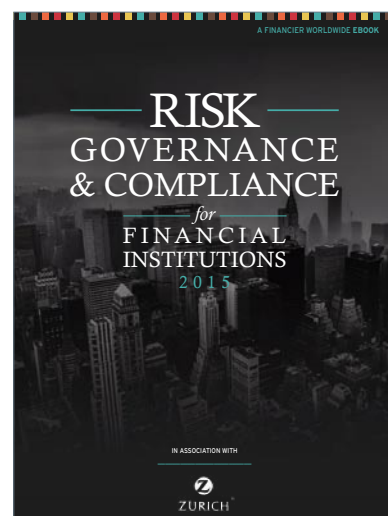
**FINANCIER**  
WORLDWIDE Corporate Finance Intelligence

# THE EVOLVING REGULATION OF PAYMENT SERVICES

---

REPRINTED FROM:

Risk, Governance & Compliance for  
Financial Institutions 2015



[www.financierworldwide.com](http://www.financierworldwide.com)

Visit the website to request  
a free copy of the full e-book

# THE EVOLVING REGULATION OF PAYMENT SERVICES

BY PAUL FOLEY AND ANDREW CLARKE  
MCKEEVER ROWAN

**T**he proper operation of a single market in payment services was and is seen as a vital component in enabling the free movement of goods, services capital and persons in the EU. Prior to the adoption of the Payment Services Directive (2007/64) (PSD), the legal framework for payment services was fragmented into 27 national legal systems, and whilst a range of community acts had been adopted, the measures they enabled were seen as insufficient. As a result, the PSD was adopted and entered into force on 25 December 2007 with a deadline for transposition by member states into national law by 1 November 2009. Some member states were late in adopting the PSD into their national systems.

Whilst the PSD was intended as a full harmonisation measure, the complexity of its provisions resulted in some member states complementing its requirements with national rules. To add to the

complexity, the PSD contained 25 optional provisions (required to take account of specific aspects of some member states' markets).

The European Commission's main aim with the PSD was to enable new types of payment institutions compete with the banks in the provision of payment services. These were at the time essentially providers of payment services which were not connected to taking deposits or the issuing of electronic money.

The PSD has a number of core elements: (i) an authorisation regime for certain payment service providers (payment institutions as defined) not benefiting from the Article 26 waiver and who are established in a member state; (ii) a definition of seven types of payment services (listed in the Annex to the Directive); (iii) harmonisation of transparency of conditions and information requirements (Title III) and the rights and obligations in relation to the provision of payment services (Title IV); (iv) requirements that rules on access of authorised or registered payment service providers to payment systems are objective non discriminatory and proportionate. However this requirement did not apply to all payment systems and as the Commission remarked this created an uneven playing field between payment institutions and notably credit institutions.

These payment systems typically include the four party schemes as well as major systems processing credit transfers and direct debits.

The regulatory capital which the Payment Institution seeking an authorisation will need to have and maintain is determined by the categories of payment services provided. Additionally, a registration system for small payment institutions and reduced regulatory requirements was one of the options, allowed for and reflected in articles 26 and 27. Some member states transposed this option, some did not.

## TERRITORIAL SCOPE AND CURRENCY SCOPE

The territorial scope and currency scope of the PSD is determined by article 2. With the exception of the article 73 value date and availability of funds requirements, the Title III (transparency of conditions and information) and Title IV (rights and obligations) requirements only apply where both the payer's payment service provider and the payee's service provider are or the sole payment service provider in the payment transaction, is located with the EU (the so called 'two-leg transactions').

Additionally, the rules in Title III and Title IV only apply to payment services in euros or the currency of a member state outside the euro area (EU currencies).

The Commission reports that 13 member states have taken the initiative to extend some of the PSD rules to one-leg transactions, to the EU segment of inbound or outbound payment transactions, either via national legislation for 11 member states or by allowing contractual derogations for the two member states. The PSD limits its scope to payment service in EU currencies. Member states which extended the application of the PSD to one-leg transactions tend to apply the PSD to currencies of non EU/EEA states as well.

These different regimes have had an impact on service providers and on consumers and many are simply not aware that there are different regulatory regimes in application.

## THE REVIEW OF THE PSD AND THE PROPOSED REVISED PAYMENT SERVICES DIRECTIVE (PSD II)

The review of the PSD noted that important areas of the payment market, in particular card payments, internet and mobile payments, are still

fragmented along national borders. Furthermore, the negative scope in Article 3 is seen in certain instances as ambiguous, too general or simply outdated taking into account market developments. This has resulted in regulatory gaps, legal uncertainty, potential security risks in the payment chain and a lack of consumer protection in certain areas.

To properly tackle these issues, a harmonised approach at European level was seen as necessary and this is currently reflected in the proposed Regulation on Interchange Fees (which, with PSD II it is proposed, would introduce maximum levels of interchange fees for transactions based on consumer credit and debit cards and ban charges on these types of card) and the draft PSD II.

## PSD II MAIN CHANGES (NON-CONDUCT OF BUSINESS RELATED)

The main changes currently proposed by the PSD II are as follows: *Widened territorial and currency scope.* The latest draft of PSD II provides that Title III and Title IV will apply to payment transactions in the currency of a member state where both the payer's payment service provider and the payee's payment service provider are, or the sole payment service provider in the payment transaction is, located therein.

Parts of Title III and IV, will also apply to payment transactions in a currency that is not the currency of a member state where both the payer's payment service provider and the payee's payment service provider, or the sole payment service provider in the payment transaction, are located in the Union, in respect to those parts of the payments transaction which are carried out in the Union.

Finally, parts of Title III and IV will also apply to payment

transactions where only one of the payment service providers is located within the Union, in respect to those parts of the payments transaction which are carried out in the Union.

*New definitions.* The introduction of two new payment services currently not covered by the PSD, namely a payment initiation service (a service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider) and an account information service (an online service to provide consolidated information on one or more payment accounts held by the payment service user with one or more other payment service providers). The former as PSD II provides, play a part in e-commerce payments by establishing a software bridge between the website of the merchant and the online banking platform of the payer's bank in order to initiate internet payments on the basis of a credit transfer. The payment initiation service provider does not in any stage of the payment chain hold user's funds. These services enable the payment initiation service provider to provide comfort to a payee that the funds necessary for a specific payment transaction are available on the account and the payment has been initiated. This aims at incentivising the payee to release the good or deliver the service without undue delay. This service offers a low-cost solution for both merchants and consumers and provide consumers with a possibility to shop online even if they do not possess payment cards.

As regards account information services, these provide the payment service user with aggregated online information on one or more payment accounts held with one or more other payment service providers and accessed via online interfaces of the account servicing payment service provider, thus enabling the payment service user to have an overall view of his financial situation immediately at a given moment.

*Exemptions.* PSD II notes that service providers seeking to benefit from a PSD exemption often do not consult authorities and rely on their own assessment as to whether their activity is exempted. This has led to different application of the exemptions across member states. Further the Commission noted that the exemptions appear too general or outdated in respect to market developments. In particular they noted in this context the PSD exemptions for commercial agents, limited networks of service providers, payment transactions initiated by a telecom device and independent ATM providers. PSD II proposes in its latest draft that the commercial agents exemption applies to commercial agents that act on behalf of either the payer or payee, or where acting for both, in that case the agent must not enter into possession of user's funds. PSD II after much debate, proposes that certain provisions of PSD II would apply to ATM operators who satisfy the conditions for exemption. PSD II also proposes changes to the drafting of the limited network exemption, and also to reduce the scope of the exemption for payment transactions initiated by a telecom device.

*PSD II conduct of business rules changes.* PSD II contains a number of provisions designed to enable TPPs secure access to services and access to certain information held by payment service providers, which access or information request must be decided upon in a non discriminatory manner. In the case of payment initiation services, PSD II requires the account servicing payment service provider amongst other things to treat payment orders transmitted through the services of a payment initiation service provider without any discrimination, in particular in terms of timing, priority or charges vis-à-vis payment orders transmitted directly by the payer himself, unless objectively justified.

PSD II also contains tighter safeguarding requirement in relation to funds received from the payment service users or through another payment service provider for the execution of payment transactions, so that the article 9 safeguarding requirements in PSD II apply to a payment institution providing payment services in points (1) to (6) of Annex 1. Finally PSD II also incorporates proposals on payee rights to apply surcharges, on refunds in the case of direct debits (which are the subject of some debate) and liability for unauthorised payment transactions (by way of derogation from Article 65), the payer, subject to some exceptions may be obliged to bear the losses relating to any unauthorised payment transactions, up to a maximum of €50 resulting from the use of a lost or stolen payment instrument or, if the payer has failed to keep the personalised security credentials safe, from the misappropriation of a payment instrument.

## SECURITY

PSD II notes that the security risks related to electronic payments have increased, which is due to the greater technical complexity of electronic payments, the continuously growing volumes of electronic payments worldwide and the emerging types of payment services. The PSD provisions on security, including those in article 57, are enhanced by PSD II including provisions on operational and security risks.

As late as December 2014, the Presidency published a compromise proposal in relation to PSD II. Of course, the proposed Regulation on Interchange Fees (fees paid by banks to each other for each card payment) will have to be considered by any affected party. Political agreement on the Regulation was agreed in December 2014. Once PSD II is finally agreed (it was originally thought that agreement would have been reached by end of December last), it will go to the Parliament for



final consideration. The Directive is required to be implemented by member states within two years of its adoption.

The agreed text of the proposed Regulation introduces a cap on both in-state and cross-border member state payments (which vary depending on whether debit or credit card) on interchange fees for transactions based on consumer credit and debit cards.

*Paul Foley is a partner and Andrew Clarke is a solicitor at McKeever Rowan.*

---