

PSD

GUIDANCE FOR THE IMPLEMENTATION OF THE **PAYMENT SERVICES DIRECTIVE**

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EUROPEAN BANKING INDUSTRY
PSD EXPERT GROUP



EUROPEAN ASSOCIATION OF CO-OPERATIVE BANKS
GROUPEMENT EUROPEEN DES BANQUES COOPERATIVES
EUROPÄISCHE VEREINIGUNG DER GENOSSENSCHAFTSBANKEN

Endorsed by:



General Introduction

Introduction to the PSD

The Payment Services Directive (PSD), formally known as the New Legal Framework for Payments, was published in the Official Journal of the European Union (EU) on 5 December 2007. All 30 countries of the European Economic Area (EEA), which makes up the Single Market in the EU, are required to have implemented the requirements of the PSD into their national legislation, in the case of the EU countries by 1 November 2009.

The very broad and ambitious scope of the PSD makes it the most significant piece of EU Financial Services legislation in relation to the payments market ever seen. It will have implications for all current and future providers and users of payment services within the EU and beyond as well as for market infrastructures, card schemes, software vendors and other ancillary service providers.

In addition to providing the legal foundations for the Single Euro Payments Area (SEPA) initiative, the Directive introduces a new licensing regime to encourage non-banks to enter the payments market; sets common standards for terms and conditions with a focus on high levels of transparency; establishes maximum execution times for payments in euro and other EU/EEA currencies; looks to encourage the adoption of more efficient payment types; and for some Member States, introduces a shift in liability between providers and customers in the interests of consumer protection.

While the PSD brings positive changes for payment service users in terms of enhanced transparency and streamlined operational rules around payment service execution, Payment Service Providers (PSPs) face significant compliance costs including adjustments to systems and services in order to ensure they are PSD-compliant in time for the 1 November 2009 transposition deadline. The fact that many national PSD legislations will only be available to the market in the autumn creates significant additional complexity for banks and their customers in ensuring timely compliance.

About the PSD Expert Group

The European banking industry PSD Expert Group (PSD EG) was established in 2007 by the European Banking Federation (EBF) in response to the final publication of the Payment Services Directive at EU level, in cooperation with the European Association of Co-operative Banks (EACB), the European Payments Council (EPC) and Visa and Mastercard. Since its creation, the PSD Expert Group has enjoyed a constructive and fruitful dialogue with the EU Commission Services in DG Internal Market and Services, as well as with representatives of the EU Council of Finance Ministries, with the aim of ensuring a consistent and harmonised national transposition of the Payment Services Directive across the Single Market.

About this document

One of the original objectives of the PSD EG was to record and formulate practical PSD implementation guidance for banks based on the outcome of the EG's constructive dialogue with the EU Commission Services and national authorities with the goal of contributing to a consistent and efficient PSD implementation across the EU/EEA and to ensuring that the PSD is implemented in line with its objectives.

This document constitutes that guidance and is intended to provide high level assistance to banks in relation to both the interpretation and practical application of the PSD. The document does not aim to be exhaustive in the list of topics it addresses, but rather focuses on specific issues that have been the subject of discussion during the course of the PSD EG's work and/or relate to frequently asked questions from the market.

It should be stressed that this is a living document, which will be updated from time to time as necessary. For further information on the PSD EG and for any queries in relation to this document, please contact the PSD EG Secretariat at the European Banking Federation: f.derouck@ebf-fbe.eu

Finally, it should be noted that neither the EBF, the EACB, the PSD EG, nor any of the individuals who have helped develop this document accept any responsibility for any loss or damage caused or suffered by any person who relies upon this document and the guidance contained in it. This document is not intended to constitute legal advice and has no legal status: ultimately, the implementation and interpretation of the PSD is a matter for the European Court of Justice, and questions of compliance with the PSD as transposed into national law are matters for the relevant national competent authorities and courts. Banks will need to determine for themselves how this guidance applies to their individual circumstances and their particular products and services.

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I. Structure and overview of the PSD

The PSD is divided into broad sections (Titles), covering: scope and definitions: (Title I), the regulation of payment institutions (Title II), conditions for transparency and information for payment services (Title III) and rights and obligations of users and providers of payment services (Title IV), followed by specific implementation measures and final provisions.

Structure of the Directive	
<u>Title</u>	<u>Subject</u>
I.	Subject matter, scope and definitions
II.	Payment service providers
III.	Transparency of conditions and information requirements for payment services
IV.	Rights and obligations in relation to the provision and use of payment services
V.	Implementing measures and the Payments Committee
VI.	Final provisions
Annex – list of payment services in scope	

Although this is a “full harmonisation” Directive intended to provide clear and harmonised rules across Europe, there are separate levels where certain provisions of the PSD can be implemented differently. Member States have a number of options to implement certain provisions differently or to waive them altogether. For example, Member States have the discretion to decide on shorter maximum execution times for purely national payments, treat ‘micro-enterprises’ as consumers under the PSD or to establish slightly differing rules for the newly regulated non-bank Payment Institutions (PIs). Additionally, the “competent authorities” appointed by Member States to supervise the implementation of PSD have a degree of flexibility in the interpretation of certain provisions.

The European Commission maintains a record of the transposition plans for each Member State which shows the expected timelines for adoption and entry into force of the implementing legislation in each jurisdiction.

The following table – sourced from the Commission’s PSD Website – provides an official summary of Member State transposition plans as at 31st July 2009.

Transposition plans by country

Countries	Adoption											
	Entry into force											
	2009											
	3	4	5	6	7	8	9	10	11	12		
AT					OK							
BE												
BG	OK											
CY												
CZ												
DE					OK							
DK			OK									
EE												
EL												
ES												
FI												
FR						OK						
HU				OK								
IE												
IS												
IT												
LI												
LT												
LU												
LV												
MT												
NL												
NO						OK						
PL												
PT												
RO												
SE												
SI						OK						
SK												
UK	OK											
	3	4	5	6	7	8	9	10	11	12		
	2009											

AT - Austria
 BE - Belgium
 BG - Bulgaria
 CY - Cyprus
 CZ - Czech Republic
 DK - Denmark
 DE - Germany
 EE - Estonia
 EL - Greece
 ES - Spain
 FI - Finland
 FR - France
 HU - Hungary
 IE - Ireland
 IS - Iceland

Country codes:

IT - Italy
 LT - Lithuania
 LI - Liechtenstein
 LU - Luxembourg
 LV - Latvia
 MT - Malta
 NL - Netherlands
 NO - Norway
 PL - Poland
 PT - Portugal
 RO - Romania
 SE - Sweden
 SI - Slovenia
 SK - Slovakia
 UK - United Kingdom

II. Scope and Definitions

1. Introduction

Title I of the PSD (in conjunction with the Annex) contains the subject matter, scope and definitions which set out the activities that are regulated and those that are excluded, lays down the types of service providers that come within scope and defines key terms. This Title forms the foundation of the Directive and its terms are the pillars on which the conduct of business requirements in Titles III and IV are constructed.

The Directive applies to “payment services in the Community” made in euro or the currency of a Member State outside the euro area. Payment services are defined in the Annex to the Directive, and cover activities that most banks operating in the market are involved in, as well as e-money operations and the issue and administration of low value, pre-funded cards.

The key activities listed are as follows:

- *Cash placed and withdrawn on/from a payment account*
- *Execution of payment transactions*
 - *Credit transfers, including standing orders*
 - *Direct debits, including one-off direct debits*
 - *Payment card transactions*
- *Issuing and / or acquiring of payment instruments*¹
- *Money remittance*
- *Execution of payment transactions through the intermediary of a telecom, IT system or digital operator*

The Directive also lists a number of exclusions from its scope, notably:

- *Cash payments from the payer to the payee (but any cash transaction involving movement to or from a payment account will be caught)*
- *Cheques and paper instruments*
- *Cash transportation (e.g. cash deliveries by commercial security companies)*
- *Payment services associated with securities asset servicing (e.g. dividend payments)*
- *Technical services including independent ATM deployers*
- *Instruments that can be used within a limited network of service providers or a limited range of goods or services, and*
- *Certain payment transactions through telecommunication, digital or IT devices.*

It is unusual for any Directive to include a list of activities excluded from its scope. However, it should be noted that these negative scope provisions do not constitute a complete list – in other words they do not (and could not) describe all possible products and services not covered by the Directive.

¹

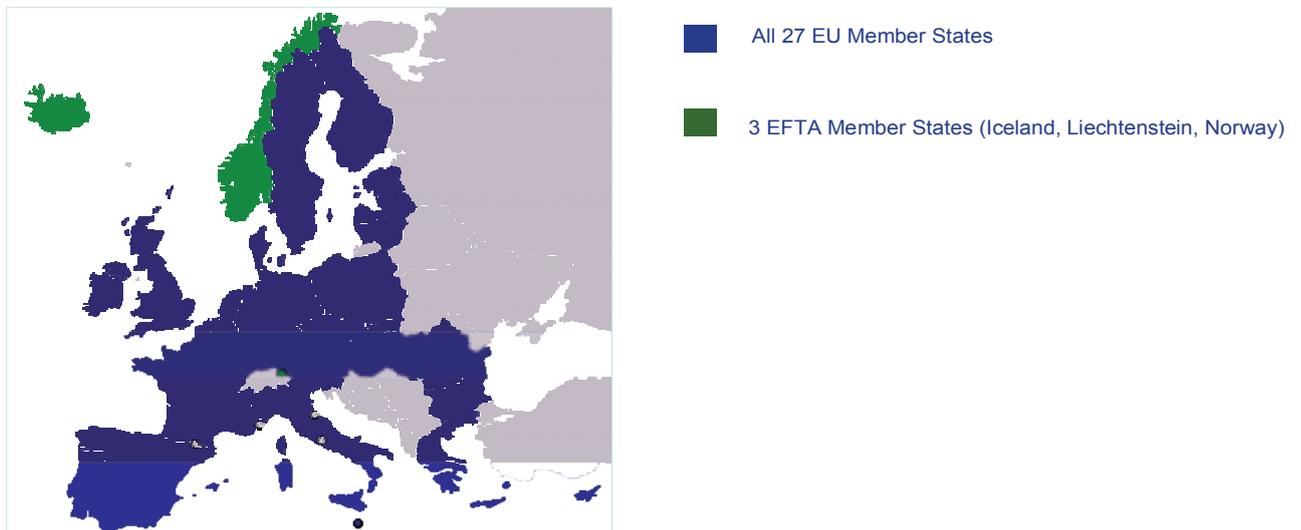
The Commission Services clarified in their response to the PSD EG of the 27/03/2008 that the meaning of this service actually relates to the acquisition of “payments” rather than of “payment instruments.”

The Directive requires any institution, as defined in Article 1, providing payment services to be authorised, either under existing regimes, such as the Banking Directive, or as payment institutions under Title II, or as an E-Money institution under the E-money Directive. All providers of payment services are known as Payment Service Providers or “PSPs” (**Note:** Please refer to Article 1 for a full list of the six categories of PSPs).

Geographical scope of the PSD

The PSD will be implemented by all Member States within the European Economic Area. This includes the 27 members that comprise the European Community plus Norway, Iceland and Liechtenstein of the European Free Trade Association.

Geographic scope



(Note: The overseas territories of EU Member States are not shown on this map)

Scope of PSD vs SEPA

Whilst provision of legal support for the emergence of the Single Euro Payments Area (SEPA) was one of the key regulatory objectives behind the PSD, there are some significant differences of scope between these two initiatives. The following table provides a brief overview of the key differences.

Feature	SEPA	PSD
Currency	Euro	All EU/EEA currencies
Legal nature	Self-regulatory initiative	Directive
Geographical scope	EU, EEA and Switzerland	EU and EEA
Scope	SEPA Credit Transfers, SEPA Direct Debits and card transactions in euro within the SEPA area	All the payment services listed in the Annex to the PSD
Timing	Beginning in January 2008 with the launch of SEPA Credit Transfers (SCT) and the initial SEPA Cards Framework (SCF) deliverables.	By 1st November 2009
Focus	SCT/SDD schemes have primary focus on the PSP-to-PSP space	Primary focus on the user-to-PSP space

“Leg-out” transactions and the PSD

In the vast majority of cases, the PSD only covers payment transactions where both customers’ PSPs are within the EU/EEA and the transaction is made in euro or another Member State currency. The exception to this is the provisions on value-dating in Article 73, which also apply where only one PSP is within the EU/EEA and the transaction is made in a Member State currency. This is known as a “leg-out” transaction.

	Both PSPs are in the EEA	One PSP is in EEA and one PSP is outside EEA
Euro payment service	<i>Titles III and IV apply</i>	<i>Article 73 PSD applies</i>
Other EEA currency payment service	<i>Titles III and IV apply</i>	<i>Article 73 PSD applies</i>
Non-Euro and non-EEA currency payment service	<i>Titles III and IV PSD do not apply</i>	<i>Titles III and IV PSD, including Article 73, do not apply</i>

However, some Member States are considering extending the leg-out concept to further articles beyond Article 73 and/or to non-EEA currencies as part of their national implementations. This potentially creates significant planning uncertainty for PSPs, partly as these Member States involved are not all considering the same approach, but also given the short timeline remaining before November 2009.

Below is a table summarising what is understood to be the current thinking in respect of a number of Member States who are believed to be contemplating extending the scope of the PSD via their national implementations in some way. It should be noted that this is not an exhaustive list – and also that these should not be regarded as the definitive or formal positions in respect of the countries mentioned.

Member State	Potential additional requirements applied to leg-out transactions and/or transactions denominated in non-EU/EEA currencies
Finland	<p>All Articles are likely to be applied to leg-out transactions and non-EU currencies with the following exceptions:</p> <ul style="list-style-type: none"> - 52(2), 62-64, 58, 69(1), 69(3), 67, 75(1)(1-3), 75 (2)(1), 75(3), and 77. - all information requirements regarding execution time and charges payable by the PSU - additionally, Articles 69(2) and 71 apply only to EEA-currencies
Germany	<p>The provisions resulting from Articles 54 to 61, Articles 64 to 66 and Articles 74 to 78 are in principle applicable also for leg-out transactions. But the provider has the explicit allowance to deviate by contractual agreement with his customer (via opt-out).</p>
France	<p>It is anticipated that the regime for unauthorized payment transactions as implemented will also apply to leg-out cards transactions in all currencies, with some adaptations. Moreover, some information obligations under Title VIII would also be applicable to leg-out transactions in all currencies.</p>
Sweden	<p>As proposed by the Swedish FSA, Articles 1-4, 30, 32, 34-49, 51-52, 54-58, 60, 64-66, 73-74, 79 and 82.2 would be applied to leg-out transactions. It is not yet clear whether this position will be maintained by the Ministry of Finance in the final Act.</p>
Czech Republic	<p>According to the 3 first Articles of the draft Czech implementation text, the law is “a priori” applicable to all types of payment transactions and payment services for both leg-out transactions and those in non-EU/EEA currencies – but with possible exceptions that are defined in the Czech Article 75, para (1). However, it is possible to exclude the application of the Czech law to selected PSD articles where there is contractual agreement between the parties. These are: 37 (1) b) to d), 38 c) and d), 42 (2) e) and (3) a), 46, 52 (2), 59 (2), 60 (1), 62 and 63 if the provider informs the user about the risk associated with the way of granting a consent and the use of payment instrument, 67, 68, 69, 75 (1) sub-para 2 to 4 and (2); the provider however may not contractually exclude its general responsibility for an unauthorized or incorrectly executed transaction</p>
Spain	<p>General scope expected to include all payment transactions in any currency within the Spanish Territory.</p>
Denmark	<p>The following PSD Articles are expected to be applicable for payments from Denmark to non-EEA-countries in all currencies: articles 37 (except 37(1)(b) concerning maximum execution time), 43, 44, 45, 46, 47, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66 and 79.</p>

2. Key Definitions – best practice guidance:

Consistent implementation of many of the conduct of business requirements in Titles III and IV is dependent on a clear understanding and interpretation of the key terms defined within Article 4.

Principal among these are the definitions of business day, payment account, unique identifier, payment order and payment instrument.

The interpretation of these terms will determine how key provisions are implemented. For example, the interpretation of “business day” is central to understanding how to implement Article 73 on value dating and availability of funds.

a) Definition of “Business Day”

Article reference:

Article 4(27)

‘business day’ means a day on which the relevant payment service provider of the payer or the payment service provider of the payee involved in the execution of a payment transaction is open for business as required for the execution of a payment transaction.’

Best Practice Guidance:

A “business day” is the time when a branch or system required to process a particular payment transaction is open. Business days can differ according to the payment type/product and system required for its processing; for example, one system may operate on a 24 hour, 7 days a week basis whilst another may only operate from 10am to 4pm on weekdays (not including Bank Holidays).

Additionally, the PSD allows for PSPs to set cut-off times for a payment service (which again may vary according to the payment type/product and system required for its processing); Such cut-off times must be near the end of a “business day” and so, for example, any payment orders received later than the cut-off time can be deemed to have been received the next business day.

The key is that information on cut-off times and business days should be made clear for payment service users so that they know when a payment order will be deemed to have been received. This is important because the PSD sets clear requirements on the execution time of payments and communication thereof.

The information on cut-off times established by the PSP needs to be provided to the PSU in the framework contract (and in the prior general information before the customer is bound by the framework contract).

b) Definition of “Payment Account”

Article Reference:

Article 4 (14) Definitions

‘Payment account’ means an account held in the name of one or more payment service users which is used for the execution of payment transactions.’

Best Practice Guidance:

The Commission Services confirmed early in 2008 that they considered ‘pure’ loan accounts and ‘pure’ mortgage accounts (i.e. except hybrid mortgage accounts) to be excluded and stated that “savings accounts where the holder can place and withdraw funds without any additional intervention or agreement of his PSP should be considered as payment accounts within the meaning of the PSD”, identifying fixed term deposits as clearly being excluded by this test.

The PSD EG suggested building on this approach by adopting a principles-based approach that:

- *focuses on the **underlying purpose and functionality of an account**, not its ‘type’ or ‘denomination’, on the basis that the underlying legislative intent of the Directive is to focus only on those accounts whose main purpose is the execution of payment transactions.*
- *takes into account **the presence of contractual terms** which confirm the nature of the account - and therefore demonstrate whether or not it should be treated as falling under the definition of ‘payment account’.*

The Commission responded that a principles-based approach was “exactly what has been discussed within the PSDTG” (the PSD TG is the EU Commission-led Member State Transposition Group).

We believe the Commission’s position to be fully in line with the PSD EG’s proposal for using a subjective self-assessment test based on purpose and functionality to determine whether an account would fall within scope.

c) Definition of “Payment Instrument”

Article Reference:

Article 4 (23) Definitions

‘Payment instrument’ means any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment.’

Best Practice Guidance:

It is important to understand what devices and procedures fall under this definition.

As part of the ongoing dialogue between the PSD EG and the EU Commission, a helpful explanation was provided by the EU Commission in a letter of 28.03.08 stating the following:

“This definition in the original Commission proposal was meant to include only “payment (verification) instruments”, which would cover physical devices (such as cards or SIM cards) and/ or set of procedures (such as PIN codes, TAN codes, digipass, login/password, etc.) which a payment service user can use to give instructions to his payment service provider in order to execute a payment transaction. This definition should be read together with definitions 19 (“authentication”) and 21 (“unique identifier”). So, a payment instrument is used to initiate a payment transaction whose execution is part of a payment service (a direct debit, a card payment, a credit transfer, etc.). If the payment transaction is initiated by paper, the paper slip itself is not considered as a payment instrument.”

Furthermore, the Commission stated in late 2008 (FAQ 34) that “this definition is meant to cover physical devices (such as cards or mobile phones) and/or [a] set of procedures (such as PIN codes TAN codes, digipass, login/password etc) which a payment service user can use to give instructions to his payment service provider in order to execute a payment transaction. If the payment transaction is initiated by paper, the paper slip is not considered as a payment instrument”.

The fact that the initial term used in the Directive draft was “Payment **Verification** Instrument” serves as useful contextual reminder as to the relatively narrow application of this term.

3. General FAQs

1. What is the impact of the PSD on contractual relationships between banks concerning payment processing and services?

With very few exceptions (such as the full amount principle in Article 67) the direct regulatory focus of the PSD is limited to the relationship between a PSP and its end corporate/retail customers, rather than focussing on what happens in the inter-bank space and what contractual relationships may be in place there.

It is clear, for example from Articles 3(h) and 3(m) that a PSP (including a bank when acting as a PSP) is always regarded as a PSP under the Directive rather than as a PSU. As such, there would be no need, for example, to put a framework contract in place for another PSP or to consider whether/how to apply the corporate opt-out articles to the contractual relationship between one PSP and another.

Thus, whilst there may be PSD impacts on the contractual relationships between banks (and PSPs in general), these impacts are indirect consequences of the PSD's direct requirements in the PSP-to-end-customer space.

2. Are Documentary products (such as documentary credits and documentary collections) within the scope of the PSD?

Broadly speaking, documentary products per se are out of scope, but see below for more specific analysis.

A documentary credit is a written undertaking given by a bank on behalf of an importer to pay an exporter a given sum of money within a specified time, providing that the exporter presents documents, which comply with the terms laid down in that letter of credit. The provision of a documentary credit is not within the scope of the PSD. The resultant payment made by the bank to the exporter on behalf of the payer could sometimes be in scope – for example if it involves an intra-EU credit transfer in an EEA currency – but if so is therefore likely to be made using a payment product or service which has already been checked for PSD compliance.

The provision of documentary collections would also be out of scope. The collections normally comprise a set of commercial documents relating to goods being exported, which are sent to an importer's bank. The underlying payment transaction from an importer's payment account relating to that documentary collection could sometimes be in scope (as above).

3. What is the general position in respect of regular payment transactions made from a PSU's payment account to cover interest/repayment of a loan or mortgage?

In this scenario, it is worth noting that a loan/mortgage account itself should be considered as out of scope on the basis that the simple act of lending funds or receiving funds to repay that loan does not amount to provision of a payment service under the PSD. However, the actual payment transaction into the loan/mortgage account may be in scope in some circumstances.

4. Do payments in Swiss Francs fall under the scope of the PSD given that the Swiss Franc is the official currency of Liechtenstein?

According to the Commission Services, Titles III and IV of the PSD also apply to payment transactions made in Swiss Francs (CHF) within the EU/EEA countries, covering, amongst others, a transfer between two PSPs both located in one Member State (e.g. France).

5. What is the intention behind the definition of the “Unique Identifier”?

The definition of the Unique Identifier has been included in the PSD partly as a supporting measure to facilitate the efficient and automated processing of payments within the Single Euro Payments Area (SEPA) initiative where payments are being sent and received using IBANs (to identify the PSUs' account numbers) and BICs (to identify the banks involved in the payment chain). However, to allow for a variety of alternative services and business models in the market today (such as those offered by Money Remittance providers) as well as to ensure future proofing, the definition of 'Unique Identifier' in Article 4(21) is a wide one which – as the Commission confirmed in the answer to FAQ 32 – “may also include card numbers or any other identifiers provided by a payment service provider to his user so that it can execute a payment transaction”.

6. What is the difference between a “Payment Order” and a “Payment Transaction”?

There is an important distinction to be made between a payment order and a payment transaction. A payment order is an instruction from a payer or payee to his PSP to initiate a payment transaction. However, for a variety of reasons a payment order may not be executed and therefore never lead to a payment transaction.

For example, this may be the case if the details of the payee provided by a payer to his PSP were incomplete or there were to be insufficient funds in the payer's account. In such circumstances, although a payment order is received, no payment transaction is made as a result.

III. Information Requirements

1. Introduction

Title III of the PSD sets out in detail what information PSPs are required to provide to their customers, both for single payment transactions and where there is an ongoing relationship that is covered by a 'framework contract'.

The PSD recognises that different business models exist in the payments market and that these require different treatment. For example, PIs such as money remitters will often be dealing with customers where there is no ongoing relationship; any payment service carried out for them will be under a single payment transaction contract. However, a credit institution such as a bank will tend to deal with customers where there is an established relationship and any transactions are carried out within the contractual agreement of a framework contract. An exception to this might be where a regular customer of a credit institution wishes to make a single type of payment transaction which is not covered by the framework contract already in place. In such a case, the PSP and PSU may agree to carry this out under a single payment transaction contract rather than adding such a service to the framework contract, although both options are available.

Information requirements under the PSD include those that must be given as prior general information before the conclusion of the contract and those more specific details to be provided or made available before or after a single payment transaction is executed.

The PSD also recognises that consumers and corporates have different needs; therefore, there is an option for PSPs and their non-consumer customers to agree that the requirements in this area of the Directive do not apply

2. Best practices in relation to key PSD information requirements

a) Framework contracts – meaning and scope

Article reference:

Article 4(12) Definitions

'Framework contract' means a payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account.'

Best Practice Guidance:

A framework contract is focused on a specific set of terms governing the provision of payment services. In line with the definition in Article 4(12) it may (or may not) cover the setting up or operation of the account itself, which the PSP is therefore free to cover in an entirely separate contract with the payment service user (PSU) or as a separate section or module of a broader contract with the PSU which for (include the payment services 'framework contract' element as an additional module or :

The same framework contract can govern payments into/out of several accounts, provided all of the accounts are with the same PSU. The two months' notice requirement for changes only relates to the framework contract elements of a PSU's Terms & Conditions. It is up to each PSP to decide on the structure of an account's contract: for example all provisions can be included in one set of terms and conditions; the framework contract can be completely separate to the rest of the contract; or all terms can be part of the same contract but can be differentiated.

b) Corporate Opt-out

Article References:

Article 30(1) + (2) Scope

- 1) *This Title shall apply to single payment transactions, framework contracts and payment transactions covered by them. The parties may agree that it shall not apply in whole or in part when the payment service user is not a consumer.'*
- 2) *'Member States may provide that the provisions in this Title shall be applied to micro enterprises in the same way as to consumers.'*

Article 51 Scope

- 1) *'Where the payment service user is not a consumer, the parties may agree that Article 52(1), the second subparagraph of Article 54(2), and Articles 59, 61, 62, 63, 66 and 75 shall not apply in whole or in part. The parties may also agree on a time period different from that laid down in Article 58.'*
- 2) *'Member States may provide that Article 83 does not apply where the payment service user is not a consumer.'*
- 3) *Member States may provide that provisions in this Title are applied to micro enterprises in the same way as to consumers.'*

Best Practice Guidance:

PSPs are allowed to opt-out of applying a number of provisions (all of Title III and certain Articles of Title IV) to non-consumer clients, subject to that client's agreement. Decisions on whether or not to exercise the opt-out are made at bank level, rather than country or regional level and the opt-out may be applied in whole or in part.

The agreement of the customer to the opt-out is required. In the absence of national provisions to the contrary, the manner of obtaining consent for the opt-out would seem to be a matter of contractual construction to be determined in accordance with the existing terms and conditions agreed with the customer or resulting from general principles of law.

c) Use of “where appropriate” in providing information to the PSU

Article reference:

Article 48(1)(a) Information for the payee on individual payment transactions

1) *‘After the execution of an individual payment transaction, the payee’s payment service provider shall provide the payee without undue delay in the same way as laid down in Article 41(1) with the following information:*

a) the reference enabling the payee to identify the payment transaction and, where appropriate, the payer, and any information transferred with the payment transaction.’

(Also see similar usage of the phrase “where appropriate” under Articles 38, 39 and 47)

Best Practice Guidance:

The PSD provides a minimum list of information to be passed on to the payee in Article 48(1)(a – e). However, the PSP can tailor the additional information that they provide to the payee according to the product/service in question. The specific use of the term “where appropriate” in this context (for example in Article 48(1)(a)) allows the PSP to take into consideration such factors as scheme rules (such as those in the SEPA SCT and SDD Rulebooks), practical constraints around communication channels and applicable law such as data protection requirements.

The key requirement here is that of transparency and ensuring that the payment service user gets what is needed to identify their transactions.

3. General FAQs

1. Article 4 (12) - Does a framework contract have to be a self contained-document?

For the purposes of the PSD, the framework contract referred to in the PSD means those terms which apply to payment services. A PSP’s framework contract (i.e. the payment services terms) could form part of a broader contract containing provisions relating to non-payment services, but for PSD purposes the framework contract should be taken as referring only to the payment services related elements of that broader contract.

The PSD does not require a framework contract to be a self-contained document. While a PSP may wish to structure a framework contract into a self-contained document for convenience, it may also structure the framework contract as a modular document such that individual payment services could be covered by separate sections or indeed by separate documents.

The PSD does not prescribe how a PSP should structure its contractual arrangements with its users, leaving PSPs with the freedom of choice in this respect. This freedom of choice would, for example, allow a PSP to treat a framework contract as extending also to terms and conditions relating to any underlying payment account.

2. Article 44(3) - To the extent it applies, how should the obligation in Article 44(3) to implement and calculate changes in interest and exchange rates "in a neutral manner that does not discriminate against payment service users" be construed?

The main thrust of the provision focuses on openness and fair treatment - what is implied by the provision is that PSPs should be transparent and take care to ensure that customers are treated fairly.

3. Articles 44 - Does the two-month notice period apply to the addition of new payment services to an existing framework contract?

The aim of this provision is to protect the PSU from a unilateral change proposed or imposed by the PSP. In case the PSP proposes a change to an element already agreed in the framework contract, the two-month period applies. As far as a new element, such as a new payment service, is offered and the customer is ready to accept it immediately, this should be possible and the period of two months does not apply. However, the contractual provisions for the new service can later form an integral part of the former framework contract.

4. Articles 47(1)(a) and 48(1)(a) - Is a PSP obliged to provide a reference for each transaction to the customer?

One of the main objectives of Articles 47(1) and 48(1) is to ensure that the payer / payee can easily identify their payment transactions. The PSU has to be provided with the information mentioned in both articles, where applicable, including a reference sufficient to enable the payer and the payee to identify each payment transaction. Provision of a separate unique transaction reference is one possibility, but the general requirement is to ensure that the set of information provided or made available (as appropriate) under Article 47(1) and 48(1) enables a customer to identify that payment transaction.

5. Articles 47(1)-(2) and 48(1)-(2) - Can the obligation to 'provide or make available' the information in Article 47(1) and 48 (1) be satisfied by providing an electronic statement rather than a monthly paper based statement?

Yes, if agreed in the framework contract, the obligation to 'provide or make available' the information in Article 47(1) / 48 (1) can be satisfied by providing an electronic statement rather than a monthly paper based statement - but PSPs may also wish to consider making the monthly information available on paper at a customer's request (e.g. where a customer does not have electronic access). (Note: PSPs need to check that their Member State has not exercised the derogations in Article 47(3) / 48(3) allowing them to require PSPs to "provide information on paper once a month free of charge".)

Where there are no transactions (or the transactions relate only to the payment of interest) there is no obligation under the PSD to provide the information.

6. Do the information requirements specified in Article 42 apply to a non-payment account (e.g. fixed term savings account)?

No, the information requirements specified in Article 42 only apply to a payment account. If a payment account is not involved, the requirements of PSD Chapter 3 relating to a framework contract (including Article 42), do not apply. Recital 24 also supports this by noting that if 'there is a payment account or a specific payment instrument, a framework contract is required'. As to what, if any, information requirements might apply to a non-payment account, this question falls outside the PSD.

IV. Payment Transaction Processing and Rights and Obligations

1. Introduction

This section of the Directive sets out the rights and obligations of the PSPs and PSUs in respect of payment transaction processing. It aims to streamline and benchmark operational conduct of business to increase efficiencies in the Single Market for Payments as well as to increase consumer protection in a harmonised way, with the aim of triggering more cross-border activity to enhance competition and trade.

The main points of note in relation to Rights and Obligations are as follows:

- *The corporate “opt out” recognises the differing positions of consumers and businesses, with the option, in relation to certain articles, that “the parties may agree” that they do not apply;*
- *PSPs may not charge customers for fulfilment of their information obligations or corrective and preventive measures under Title IV unless otherwise specified for certain Articles;*
- *There is a legal obligation on the customer to use any payment instrument (e.g. a credit card) in accordance with its terms and conditions of issue and use, to take all reasonable steps to keep it secure, and to notify without undue delay the issuer of loss, theft, misappropriation or unauthorised use;*
- *PSPs issuing payment instruments are subject to various obligations such as ensuring that the personalised security features are not accessible to other parties and not sending unsolicited payment instruments (except as a replacement);*
- *The payment users are also subject to various obligations such as notifying the PSP without any delay on becoming aware of loss, theft or misappropriation of the payment instrument or of its unauthorised use or keeping the payment instrument’s personalised security features safe;*
- *Where a transaction is found to be unauthorised, the PSP has an obligation to refund to the payer immediately the amount of the unauthorised payment transaction and to restore the account to the state it would have been in had the unauthorised payment transaction not happened;*
- *For payments in euro; in the domestic currency of the EU member state concerned (i.e. Sterling for UK transactions); or where there is only one currency conversion taking place in a non-Euro Zone Member State between euro and its domestic currency and the transfer is cross border and denominated in euro, the Directive introduces a default maximum timescale for execution of D+1. However, PSPs can agree up to D+3 until 1 January 2012 with their clients. These periods may be extended by a further business day for paper-initiated payment transactions. For transactions in a Member State currency other than those listed above the Directive allows agreement between PSP and PSU of an execution time of up to four business days;*
- *The Directive also stipulates that the credit value date should be no later than the business day on which the amount is credited to the payee’s PSP’s payment account and the debit value date should be no earlier than the point in time at which the amount is debited to the payer’s account.*

2. Inter-bank best practices in relation to key PSD operational requirements

a) Full amount principle and charging rules

Article Reference:

Article 67(1-2) Amounts transferred and amounts received

- 1) *'Member States shall require the payment service provider of the payer, the payment service provider of the payee and any intermediaries of the payment service providers to transfer the full amount of the payment transaction and refrain from deducting charges from the amount transferred.'*
- 2) *'However, the payee and his payment service provider may agree that the payment service provider deduct its charges from the amount transferred before crediting it to the payee. In such a case, the full amount of the payment transaction and charges shall be separated in the information given to the payee.'*

Article 52(2) Charges applicable

'Where a payment transaction does not involve any currency conversion, Member States shall require that the payee pays the charges levied by his payment service provider, and the payer pays the charges levied by his payment service provider.'

Context:

As required by **Article 67**, no deductions of charges are allowed from the full amount of a payment transaction, except by the payee's PSP where this has been agreed with the payee. For Article 67 to apply, both legs of the payments should be in the EU/EEA and the transaction should be in euro or another Member State currency. **[Note: Attention needs to be paid here to the non-exhaustive list of special cases referred to in Part II of this document identifying where certain Member States may be choosing to apply additional provisions to leg-out or non-Member State currency transactions as part of their national transpositions.]**

In turn, **Article 52(2)** establishes the charging principle that the payer and payee should pay the charges levied by their respective service providers, unless the payment transaction involves a currency conversion. **[Note: Recital 41 makes clear that this requirement has no direct impact on pricing between PSPs and/or any intermediaries. The Recital also makes clear that, depending on contract terms "a payment service provider may charge only the payee (merchant) for use of the payment service, which has the effect that no charges are imposed on the payer".]**

Looking at the implications from a practical perspective on the applicability of the traditional cross-border charging options (OUR/SHA/BEN) for payments falling under the scope of the Directive:

- The SHA option is clearly allowed, whether or not there is a currency conversion, as it is fully in line with the 'share principle' so long as the full amount principle in Article 67 is respected.
- In practical terms the use of the BEN option does not make sense for a PSD-cc the requirement to adhere to the full-amount principle in Article 67.

- The OUR option is clearly still allowed in situations where there is a currency conversion. Where there is no currency conversion, the Commission Services have advised – for example in the answer to FAQ 196 – their view that in these circumstances “it will not be possible to indicate the OUR option any longer for payment transactions covered under the Directive, which do not involve any currency conversion. For these transactions, the SHARE principle applies in accordance with Article 52(2).” This position was further re-enforced by the Commission Services in their subsequent answer to FAQ 253. *[Note: This position is believed to be supported by a number of Member States, but not by all, as some are believed to favour a greater level of contractual freedom around the ongoing use of the OUR option – something which the Commission Services believe is not in line with the intention of the European legislators. Consequently, PSPs may need to pay close attention to the detail of national transposition texts.]*

Best Practice Guidance:

1) Payer's PSP

- Where the payment is to be sent in a Member State currency and to an EU/EEA Beneficiary Bank BIC then the general rule is that no deductions can be made to the full amount (Article 67). The exception is if the payment relates to an out-of-scope transaction (e.g. an asset servicing payment).
- Additionally, if the payment is being made in a Member State currency and to an EU/EEA Beneficiary Bank BIC and does not relate to an out-of-scope activity, then in the view of the Commission Services charges code SHA would generally seem to be the appropriate charging code to use for credit transfers.
- All traditional charging options (OUR/SHA/BEN) of course remain available for out-of-scope payments.

2) Intermediary PSP

- An intermediary PSP should not deduct its charges from the full amount for payments sent by a payer's PSP located in an EU/EEA country when the payment is in an EU/EEA currency and is destined for an EU/EEA Beneficiary bank BIC.
- In respect of handling charging codes, the logical approach for an intermediary would be to forward on the charges code it receives in a payment message, unless there are contractual terms agreed with its client PSP to amend the code in some circumstances.

3) Payee's PSP

- Article 67(2) does allow a payee's PSP to deduct charges - but only if this has been agreed with the payee. Otherwise, the full amount will need to be credited and any charges taken separately.
- In circumstances where a payee's PSP is not a position to know the full situations surrounding a payment (e.g. whether a currency conversion has been applied or whether the payment relates to an Article 3 out-of-scope activity such as securities asset servicing), the payee's PSP would be advised not to reject an incoming payment simply on the basis of the charges code used.
- For payments outside the scope of the PSD existing market practice around inter-bank charge code handling prevails.

b) Currency Conversion

Article reference:

Article 2 Scope

- 2) *'Titles III and IV shall apply to payment services made in euro or the currency of a Member State outside the euro area.'*

Article 68 Scope

- 1) *'This Section shall apply to:*
 - a) *payment transactions in euro;*
 - b) *national payment transactions in the currency of the Member State outside the euro area concerned; and*
 - c) *payment transactions involving only one currency conversion between the euro and the currency of a Member State outside the euro area, provided that the required currency conversion is carried out in the Member State outside the euro area concerned and, in the case of cross-border payment transactions, the cross-border transfer takes place in euro.'*
- 2) *This Section shall apply to other payment transactions, unless otherwise agreed between the payment service user and his payment service provider, with the exception of Article 73, which is not at the disposal of the parties. However, when the payment service user and his payment service provider agree on a longer period than those laid down in Article 69, for intra-Community payment transactions such period shall not exceed 4 business days following the point in time of receipt in accordance with Article 64.'*

Background:

The issue is the extent to which the PSD regulates the time taken to conduct a currency exchange which takes place at one or both ends of a payment transaction – such as where a payment service user wishes to make a payment in a currency which is different to the currency of the account which he wishes to have debited, or to have a payment arriving in one currency credited to an account in another currency.

Article 68 defines the scope of application of the execution time and value dating articles (Articles 69 - 73). Throughout Article 68, reference is made to the types of 'payment transactions' that Articles 69 to 73 applies to.

Best Practice Guidance:

The EU Commission indicated to the PSD EG that payments involving a currency conversion between two EU/EEA currencies are regarded as 'other' transactions and hence governed by Article 68(2), except in the specific case foreseen in Article 68(1)(c). Hence an execution time period longer than that set out in Article 69 may be agreed between the PSU and his PSP, so long as this is no longer than D+4.

Where funds arrive with a payee's PSP in a currency different to that of the payee's account, the payee's PSP may sometimes need to seek explicit instructions from the payee, which could take time. or may simply not be able to perform the specific currency conversion requested on a same day basis due to foreign exchange markets.

In correspondence with the PSD EG in July 2009, the Commission Services confirmed that their view on this matter was that *“In cases where funds of an incoming payment transaction are to be made available on an account in another currency, the PSP should not be obliged to make these funds available immediately and to value date the amount on the same day, due to the fact that the funds need to be converted into the currency of the payee’s account. He should be given the necessary time, however within the D+4 maximum execution time mentioned in Article 68(2), to conclude the foreign exchange transaction to allow him to credit the funds in the currency of the payment account.”* This is because this currency conversion is a subsequent and ancillary service to the execution of the original transaction. Again, the specific type of currency conversion foreseen in Article 68(1)(c) - such as an inward euro payment needing to be converted and credited to a UK payee's Sterling account - would be the exception to this general principle.

In the context of value dating and payments in non-EEA currencies, the European Commission Services provided helpful clarification via their FAQ number 204 (of 12 May 2009) stating that for non-EEA currency payments that are being converted to euro within the EEA, the provisions of Article 73 do not apply (as is clarified under Article 2(2)). When the currency conversion is performed outside the EEA and the transfer of the transaction is executed in euro, the transaction, when reaching the EEA, would be deemed to be a euro transaction for which Article 73 would apply.

c) Value date and availability of funds

Article reference:

Article 73(1): Value Date and Availability of Funds

‘Member States shall ensure that the credit value date for the payee’s payment account is no later than the business day on which the amount of the payment transaction is credited to the payee’s payment service provider’s account.

The payment service provider of the payee shall ensure that the amount of payment transaction is at the payee’s disposal immediately after that amount is credited to the payee’s payment service provider’s account.’

Best Practice Guidance:

The Commission Services' response to FAQ 6 noted that "once the payee's payment service provider's account has been credited, he is immediately obliged to make the funds available to the payee according to the second subparagraph of Article 73(1), even though this would fall on a local bank holiday".

However, this needs to be read in the context of the Commission Services' subsequent response to FAQ 208 on their PSD Website, which notes that the 'immediately' requirement, in the context of Article 73, refers to the point in time at which the payee's PSP has all the information necessary to credit the amount on the payee's account. In other words, the 'immediately' requirement applies once the payee's PSP's account has been credited and he has all the information necessary to credit the amount on the payee's account. **[Note: For a specific practical example see PSD EG FAQ number 3 on page 26.]**

It is also relevant to note that the Commission Services reiterated in FAQ number 21 that for payments in non-EEA currencies the provisions of Article 73 do not apply.

d) Cash Placement

Article reference:

Article 71; Cash Placed on an Account

'Where a consumer places cash on a payment account with that payment service provider in the currency of that payment account, the payment service provider shall ensure that the amount is made available and value dated immediately after the point of time of receipt of the funds, Where the payment service user is not a consumer, the amount shall be made available and value dated at the latest on the next business day after receipt of the funds'.

Best Practice Guidance:

The PSD Expert Group believes that the 'payment service user' must be interpreted as referring to the holder of the payment account rather than the person making the cash placement. This seems to be the most appropriate interpretation in terms of achieving the consumer protection aims of the legislation whilst also bringing clarity and certainty to the operational processes that PSPs will need to follow. The Commission Services responded positively to this point when this was raised with them by the PSD EG: *"We believe that the person who places cash on a payment account acts "on behalf of the holder" and, for that reason, whether the payment account is opened by a consumer or by an undertaking could help to determine to which category belongs the person who places cash on it (e.g., the employee of a supermarket which places cash on the payment account opened on behalf of the supermarket has to be considered as a "business" for the purpose of Article 71)."*

Additionally, for the Article to be workable, it needs to be clear that PSPs need to be able to check for forgeries and errors. This may lead to the PSP making subsequent adjustments to the payee's account. Furthermore, PSPs still have to abide by other relevant requirements such as authenticity check obligations and anti-money laundering rules. The Commission Services responded positively regarding the potential need for subsequent adjustments to be made to the payee's account in some circumstances: *"In addition, the implementation of this provision would not prevent subsequent adjustments due to forgeries or errors which have been discovered by the payment service provider after the amount of cash placed has been credited to the customer's account."*

Finally, in identifying the "point in time of receipt" for the purpose of this article, it is essential to ensure technical workability that the same principles of interpretation should apply as are applied to the same phrase in Article 64. This approach would, for example, allow for receipt other than on a business day to be deferred to the next business day and for cut-off times to be set near the end of a business day. This is very important from a practical perspective – for example as it will allow for a wide range of convenient methods of cash placement to continue to be offered to PSU, such as night safes.

3. General FAQs

1. Article 60 - PSP's liability for unauthorised payment transactions - Is a PSP obliged to refund the payer immediately or is there some room for the PSP to conduct an investigation into the disputed transaction?

There is a balance to be struck between the principle of an immediate refund to the customer for an unauthorised payment transaction, and the need to determine whether the payment transaction in question was, in fact, properly authorised, or whether the customer may have failed in his own obligations with regard to the payment instrument used.

The Commission Services responded in their FAQ 223 as follows: *"This provision aims to achieve a fair balance between the liabilities of the payment service provider and the payer. When interpreting this provision, one has to consider the effects it may have on the incentives of the contractual parties. For instance, legislation should not through distorted incentives increase the likelihood of fraudulent behaviour of the legitimate payment service user i.e. so-called first-party fraud. Therefore, this provision has to be interpreted in such a way that it prevents highly unjustified claims:*

- 1) *If the payment service provider of the payer can exclude on a prima facie basis that the payer has acted fraudulently, it should refund the user immediately. If it does not refund the amount claimed, it would do so at its own risk.*
- 2) *In case of high suspicion of fraud, the payment service provider might take reasonable time to conduct an investigation. When the investigation shows that the payer acted fraudulently, the payer would bear all the losses relating to the unauthorised transaction (in accordance with Article 61(2)). However, the payment service provider would risk a sanction if it does not act promptly and the investigation does not show that the transaction was unauthorised. The adequateness of the length of the investigation needs to be calibrated on a case by case basis, taking into account all the circumstances of the case.*
- 3) *As for the cases in the 'grey area' (e.g. the payer claims that he has not failed to keep the personalised security features of the payment instrument safe), Article 60(1) would grant an immediate refund right to the payer once the notification has been made in accordance with Article 58. Once the payer has been reimbursed, the payment service provider will then have the time necessary to look for evidence, in accordance with Article 59 (e.g. if after its search for proof, the payment service provider finds evidence showing that the payer failed to keep the personalised security features of the payment instrument safe, the payment service provider would be able to debit the amount mentioned in Article 61(1) from the payer's account)."*

In addition to the above, it should be noted that the fact that Article 59 (Evidence on authentication and execution of payment transactions) is an opt-out Article which means that for corporate customers a different approach can be agreed contractually regarding evidence of authorisation / non-authorisation, which may therefore have a bearing on the application of Article 60.

2. Article 60 - PSP's liability for unauthorised payment transactions - Is a PSP obliged to refund the payer immediately or is there some room for the PSP to conduct an investigation into the disputed transaction?

There is a balance to be struck between the principle of an immediate refund to the customer for an unauthorised payment transaction, and the need to determine whether the payment transaction in question was, in fact, properly authorised, or whether the customer may have failed in his own obligations with regard to the payment instrument used.

3. Article 71 - Is it permissible to defer receipt of cash, in line with the principles applicable to "point in time of receipt" of payment orders, by making it clear and specifying to the user that deemed (deferred) receipt occurs at some later point (an example being where, because of its own limited branch network, a bank arranges for cash to be received via an agent bank's network)?

In identifying the point in time at which the cash is deemed to have been received, similar principles to those used in identifying the "point in time of receipt" for a payment order may be used. Therefore, cash not taken over the counter by a cashier (for example, left in a night safe, or in a day safe) can be deemed to have been received at a later point, if the PSP has informed the PSU of this deferred receipt. The customer's perception is an important element. PSPs should ensure clarity of communication with the customer (with appropriate prominence and timeliness) as to when receipt is deemed/deferred to avoid any misunderstanding that might arise.

4. The receipts of some currencies (e.g. NOK, SEK) depend on the operations of nostro banks. In this context, if a nostro bank credits a PSP's nostro account held by it on a Monday but the PSP is on a non-business day and cannot receive the payment-related data until Tuesday, which is when the PSP is able to credit its own clients' account immediately, is the PSP in this scenario compliant with the obligation to make the funds available at the payee's disposal 'immediately' in line with Article 73?

Yes, the PSP would seem to be compliant, particularly as the Commission Services have indicated that 'immediately' in the context of Article 73 refers to the point in time at which the payee's PSP has all the information necessary to credit the amount on the payee's account. (Please refer to the Commission Services' response to Question 208 on the list of the FAQ's on the Commission's PSD web-page).

V. Annexes

References

The entire final text of the Directive (in English) can be found on the following website:
http://eurlex.europa.eu/LexUriServ/site/en/oj/2007/l_319/l_31920071205en00010036.pdf

Relevant documents on the PSD can be found on the following website:
http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm

The websites of the main European bodies are:

European Central Bank
www.ecb.eu

European Commission
www.ec.europa.eu

European Payments Council
www.europeanpaymentscouncil.eu

European Banking Federation
www.ebf-fbe.eu

European Association of Co-operative Banks
www.eurocoopbanks.coop/

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