

A Guide to the
Payment
Services
Regulations
in Ireland

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO



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PART I - BACKGROUND

Single Market in Payment Services

Council Directive 2007/64/EC, the Payment Services Directive (“PSD”), provides the legal framework for the operation of a single market in payment services. It aims to make cross-border payments as easy, efficient and as secure as 'national' payments within an EEA Member State as well as seeking to improve competition by opening up payment markets to new entrants, thus fostering greater efficiency and cost-reduction. The Directive provides the necessary legal platform for the Single Euro Payments Area (SEPA).

Main Initiatives of the PSD

The PSD addresses three main areas:

Firstly, the PSD sets out a list of firms entitled to provide 'payment services', including credit institutions, credit unions, electronic money institutions and, in the Irish context, An Post, which do not require further authorisation under the PSD but must comply with certain of its provisions.

Secondly, the PSD creates a new category of firm, a 'Payment Institution', which must obtain prior authorisation under the PSD before providing payment services. Payment Institutions are firms which provide payment services such as facilitating deposits and withdrawals from bank accounts, executing direct debits and standing orders, money remittance and certain services provided through mobile phones or other digital and IT devices. Organisations which are not credit institutions or e-money issuers can apply for an authorisation as a Payment Institution. Once a Payment Institution has been authorised by the competent authority of a home Member State it may avail of the right of establishment and freedom to provide services in any other Member State without the requirement to obtain further authorisation.

Thirdly, the PSD imposes new prudential requirements and conduct of business requirements on all payment service providers, including Payment Institutions. The prudential requirements include capital resources and safeguarding requirements. The conduct of business requirements include transparency of conditions requirements, information requirements for payment services and the rights and obligations in relation to the provision and use of payment services.

Scope of the PSD

Broadly speaking, the types of firm likely to fall within the PSD's scope include:

- ▣ e-money issuers;
- ▣ credit institutions;
- ▣ money remitters;
- ▣ certain bill payment service providers;
- ▣ credit card companies and card issuers;
- ▣ merchant acquirers;
- ▣ certain telecommunications network operators; and
- ▣ the agents thereof.

The PSD focuses on the provision of payment services in electronic form and does not apply to cash only transactions (without any intermediary intervention) or paper transactions (i.e. cheque/bill of exchange/ promissory note/other instrument/voucher).

PART II - APPLICATION OF THE PSD IN IRELAND

Irish PSD Regulations

On 30 September, 2009 the Minister for Finance brought Directive 2007/64/EC into law through the implementation of S.I. No. 383 of 2009 the European Communities (Payment Services) Regulations, 2009 (the “Regulations”). Parts 1 and 2 came into operation on 1 October, 2009 with the remainder of the Regulations coming into operation on 1 November, 2009.

Key Requirements

The Regulations create a new class of regulated firms known as payment institutions (“Payment Institutions”) which must either be authorised or registered by the competent authority in Ireland. Authorised Payment Institutions will be subject to both prudential and conduct of business requirements.

All payment service providers, including banks, building societies, e-money issuers and Payment Institutions will be subject to conduct of business requirements and must be registered by the competent authority in Ireland.

Competent Authority

The Regulations designate the Central Bank and Financial Services Authority of Ireland (the “Financial Regulator”) as the competent authority for the purposes of the PSD.

The Financial Regulator is therefore responsible for authorisation and supervision of Payment Institutions under the Regulations. Such authorisation may be unconditional or subject to such conditions or requirements as determined by the Financial Regulator.

The Financial Regulator also has the power to withdraw an authorisation in certain circumstances.

Provision of “Payment Services”

Subject to certain exemptions, an entity which provides a payment service by way of business in Ireland will fall within the scope of the Regulations.

A “payment service” is defined in the Regulations as:

- ▣ services enabling cash to be placed on a payment account and all operations required for operating a payment account;
- ▣ services enabling cash withdrawals from a payment account and all of the operations required for operating a payment account;
- ▣ the execution of the following types of payment transactions- (i) direct debits, including one-off direct debits; (ii) payment transactions through a payment card or similar device; (iii) credit transfers, including standing orders;
- ▣ the execution of the following types of payment transactions where the funds are covered by a credit line for the payment user:- (i) direct debits, including one-off direct debits; (ii) payment transactions executed through a payment card or similar device; (iii) credit transfers, including standing orders;
- ▣ issuing payment instruments or acquiring payment transactions;
- ▣ money remittance; and
- ▣ the execution of payment transactions where the consent of the payer to execute the payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator acting only as an intermediary between the payment user and the supplier of goods or services.

What is a Payment Account?

A “payment account” is defined in the Regulations as “an account held in the name of one or more payment service users which is used for the execution of payment transactions”. No further guidance is provided by the Regulations to assist in determining whether or not an account is a “payment account” and therefore the Regulations could theoretically cover a large number of accounts such as mortgage accounts, savings accounts, current accounts, e-money accounts, credit card accounts and current account mortgages. The Commission’s questions and answers page on the subject provides further details on this matter (see <http://ec.europa.eu/internalmarket/payments/docs/framework/transposition/faq-2008>)

Exclusions from the Definition of “Payment Services”

Regulation 6 provides a list of a broad range of activities which do not constitute “payment services”, as summarised below -

- ▣ payment transactions made exclusively in cash directly by the payer to the payee;
- ▣ payment transactions through a commercial agent;
- ▣ the business of physical transport (including collection, processing and delivery) of banknotes and coins;
- ▣ non-professional cash collection and delivery within the framework of a non-profit or charitable activity;
- ▣ the provision of cash back at the point of sale;
- ▣ money exchange business;
- ▣ payment transactions based on certain types of paper documents drawn on a payment service provider with a view to placing funds at the disposal of a payee;
- ▣ payment transactions carried out within a payment or securities settlement system between settlement agents, central counterparties, clearing houses or central banks and other participants in the system, and payment service providers;
- ▣ payment transactions related to securities asset servicing (including dividends, income or other distributions, or redemption or sale) carried out by persons referred to in subparagraph (h) or by investment firms, credit institutions, collective investment undertakings or asset management companies providing investment services and any other entities allowed to have the custody of financial instruments;
- ▣ services provided by technical service providers that support the provision of payment services without them at any time entering into possession of the funds to be transferred (including processing and storage of data, trust and privacy protection services, data and entity authentication, the provision of information technology, communications networks, and the provision and maintenance of terminals and devices used for payment services);

- ▣ services based on instruments that can be used to acquire certain types of goods or services either within a limited network of service providers or for a limited range of goods or services;
- ▣ payment transactions executed by means of a telecommunication, digital or IT device, (other than as an intermediary);
- ▣ payment transactions carried out between payment service providers, their agents or branches for their own account (for example, electronic payment from one payment services provider to another in discharge of a debt owed by one to the other);
- ▣ payment transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking (without any intermediary intervention); or
- ▣ the provision of a cash withdrawal facility by means of automated teller machines in certain circumstances.

Payment Institutions

Regulation 8 provides that a person shall not provide a payment service unless the person is a “Payment Institution” or “Small Payment Institution” unless it is:

- ▣ a credit institution within the meaning of EU Banking Directives;
- ▣ an e-money institution;
- ▣ an Post or the postal authority of another Member State (in its/their capacity as the provider of a giro service);
- ▣ the Financial Regulator, the European Central Bank, or the central bank of another Member State when not acting in its capacity as a monetary authority;
- ▣ a credit union; or
- ▣ a Member State or a regional or local authority of a Member State.

Such entities are exempt from the authorisation and prudential requirements (such as the initial/ongoing capital requirements and the safeguarding requirements) under the Regulations.

Apart from the provision of payment services, a Payment Institution may engage in the following activities:

- (a) the provision of operational and closely related ancillary services such as ensuring the execution of payment transactions, foreign exchange services, safekeeping activities, and the storage and processing of data;
- (b) the operation of payment systems; and
- (c) business activities other than the provision of payment services.

The Regulations provide that a Payment Institution shall not engage in the business of taking deposits or other repayable funds.

The Regulations permit a Payment Institution to grant credit for a maximum period of 12 months if this credit is closely linked to a payment service provided. In all cases, customer funds have to be segregated from the Payment Institution's own funds and cannot be used to grant credit to another user. In addition, it is clarified that the Consumer Credit Act 1995 is not being overruled by Regulations in respect of Payment Institution's permission to grant credit.

Small Payment Institutions

Regulation 35(1) provides that a person qualifies as a small payment institution ("Small Payment Institution") for the purposes of the Regulations if -

- (a) the average amount of payment transactions executed by the person and any agent for which it bears full responsibility during the previous 12 months, is not more than Euro 3 million per month; or
- (b) the average amount of payment transactions likely to be executed by the person within the next 12 months, assessed on the projected total amount of payment transactions in its business plan, is not more than Euro 3 million per month.

A Small Payment Institution is not subject to the authorisation requirements in Regulation 10 but instead needs to be registered by the Financial Regulator as a 'small payment institution'. A Small Payment Institution that is registered but is not authorised by the Financial Regulator will not be able to passport its activities.

Agents

The Regulations also provide for the appointment of agents by authorised Payment Institutions/Small Payment Institutions (“Agents”). Agents are exempt from the authorisation requirements but they are required to be registered by their principal. When the Agent’s principal is an MEMBER STATE authorised Payment Institution, it needs to be registered on the register of the home Member State of that Payment Institution.

Regulation 28 provides that if a Payment Institution intends to provide a payment service through an Agent it shall, at least 30 days before the Agent commences to provide the service, notify the Financial Regulator in writing and provide to it the following information:

- (a) the name and address of the Agent;
- (b) a description of the internal control mechanisms that will be used by the Agent to comply with the Payment Institution’s obligations in relation to money laundering and terrorist financing;
- (c) the names of directors and persons responsible for the management of the Agent;
and
- (d) evidence that they are fit and proper persons.

When the Financial Regulator receives the information required above, it may list the Agent in the register. Before listing the Agent, the Financial Regulator may, if it considers that the information provided to it is incorrect, take action to verify the information. If, after taking action to verify the information, the Financial Regulator is not satisfied that the information provided to it is correct, it may refuse to list the Agent in the register.

If a Payment Institution wishes to provide payment services in another Member State by engaging an Agent, before the Financial Regulator registers the Agent, the Financial Regulator shall inform the competent authorities of the host Member State of its intention to register the Agent and shall take their opinion into account and shall not register such an Agent if that Member State has reasonable grounds to suspect that a reasonable grounds to suspect that money laundering or terrorist financing is taking place, has taken place or has been attempted or the engagement of the agent or establishment of the branch could increase the risk of money laundering or terrorist activities.

A Payment Institution shall ensure that any Agent acting on its behalf informs payment service users that it is acting on behalf of the Payment Institution. A payment institution remains fully liable for any acts of its employees, or any agent, branch or (as further detailed below) any entity to which activities are outsourced.

Register of Payment Service Providers

Pursuant to Regulation 9, the Financial Regulator is required to maintain publicly accessible registers of (i) Payment Institutions and their agents and branches; (ii) credit unions; (iii) Small Payment Institutions and their agents and branches. These registers appear on the Financial Regulator's website.

Transitional Provisions

Transitional arrangements allow existing operators a degree of latitude. Certain firms may be able to delay authorisation or registration until after 1 November 2009, provided that they were providing payment services in Ireland before 25 December 2007 (Regulation 115). Applications for authorisation from certain Payment Institutions are subject to less onerous information and evidential requirements in the short term only (Regulation 116).

Certain Payment Institutions may be able to continue their activities without authorisation and registration requirements until 1 May 2011. Certain Small Payment Institutions may not need to be registered until 25 December 2010. However, firms wishing to take advantage of the general transitional arrangements will still need to apply for authorisation or registration in good time before the relevant transitional arrangements expire in order to allow the Financial Regulator time to process their applications.

Most importantly, the transitional provisions only apply to authorisation and registration requirements. The conduct of business provisions came into effect for all payment service providers on 1 November 2009, including those firms taking advantage of the transitional provisions.

PART III - AUTHORISATION OF PAYMENT INSTITUTIONS IN IRELAND

Routes of Authorisation

Subject to certain exemptions, a Payment Institution will need to be:

- ▣ authorised by the Financial Regulator as an authorised Payment Institution;
- ▣ registered as a Small Payment Institution; or
- ▣ registered as an Agent of an authorised Payment Institution, MEMBER STATE authorised Payment Institution or a Small Payment Institution.

Authorisation

Details relating to the application procedure for authorisation as a Payment Institution are set out in Regulation 10.

Application Procedure

The application procedure involves:

Preliminary Meeting with the Financial Regulator: The Financial Regulator requires each proposed Payment Institution meet with it at a preliminary stage to discuss its business and the proposal to seek authorisation. Only on satisfying the Financial Regulator's preliminary enquiries can the application proceed.

Next Step - Documents Submission: The application process requires the following documentation to be submitted to the Financial Regulator:

- ▣ completed application form (either the Application Form for "Authorisation as a Payment Institution"/"The Appointment of Agents"/"The Establishment of Branches");
- ▣ detailed business plan (including financial projections covering a period of three years);
- ▣ a programme of operations;

- ▣ certified copy of memorandum and articles of association or equivalent;
- ▣ an individual questionnaire duly completed and signed by each director and key individuals (i.e. senior managers); and
- ▣ full ownership (direct and indirect) details, group structure chart (highlighting all regulated group entities) and accounts of all entities in ownership chain.

Applicant firms must send the completed application form to the Financial Regulator together with the supporting documents referred to above. Financial stability needs to be demonstrated and firms will be subject to initial and ongoing capital requirements.

Capital

At the time of authorisation a Payment Institution is required to hold a minimum level of initial capital, the level being dependent on the level of authorisation held by the Payment Institution as follows:

- ▣ where the Payment Institution is authorised to provide only money remittance as it must hold minimum initial capital (in the form required by the Financial Regulator) of €20,000.
- ▣ where the Payment Institution is authorised to provide execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services, it must hold minimum initial capital of €50,000.
- ▣ where the Payment Institution is authorised to provide any one or more of the remaining payment services it must hold minimum initial capital of €125,000.

On an on-going basis, a Payment Institution must ensure that it has sufficient capital (“own funds”) in its own right to meet the applicable capital requirement. A Payment Institution is required to hold a minimum level of own funds equal to the higher of its initial capital or the capital requirement to be held by a Payment Institution on an on-going basis. Ongoing capital requirements to be based on either one of three methods. Method A is 10% of the previous year’s fixed overheads; method B is calculated by a formula based on the level of payment transactions in the previous year; and method C is calculated by a formula based

on the level of income of the firm. A scaling factor is applied in methods B and C based on the services the institution is authorised to provide.

Where a Payment Institution forms part of a group it must ensure that the own funds held by the Payment Institution to meet the capital requirements imposed by virtue of its authorisation under the Payment Services Regulations are not used elsewhere in the group to meet regulatory capital requirements.

Conditions for Authorisation

Regulation 19 sets out the conditions for authorisation of a Payment Institution. These include the requirement that the applicant must be a legal person established in Ireland that has its head office and its registered office in Ireland, that the Payment Institution has robust governance arrangements for its payment services business, including:

- ▣ a clear organisational structure with well-defined, transparent and consistent lines of responsibility;
- ▣ effective procedures to identify, manage, monitor and report the risks to which it is or might be exposed; and
- ▣ adequate internal control mechanisms, including sound administrative and accounting procedures.

Timing

Regulation 21 provides that within three months of the receipt of an application (or, if the application is incomplete, of all the information required for the decision), the Financial Regulator shall inform the applicant concerned whether the authorisation has been granted or refused. The Financial Regulator shall give reasons if it refuses to grant the authorisation.

PART IV - KEY PRUDENTIAL SUPERVISION REQUIREMENTS FOR PAYMENT INSTITUTIONS

General

The prudential requirements (which apply to authorised Payment Institutions, but not to Small Payment Institutions) relate to initial and ongoing capital requirements. There are also rules relating to the segregation and safeguarding of customers' funds and certain accounting, audit, outsourcing and record-keeping requirements.

The requirements are set out in Regulations 22 to 33 of the Regulations. In addition, the Financial Regulator has issued a document entitled the "Prudential Requirements for Payment Institutions authorised under S.I. No. 383 of 2009 - European Communities (Payment Services) Regulations 2009" (the "Guidance Note") which sets out the prudential supervision requirements for Payment Institutions authorised by the Financial Regulator.

Capital

A Payment Institution authorised under the Regulations is subject to both an initial capital requirement and an on-going capital requirement. Please see the details set out under the sub-heading "capital" in "Part III – Authorisation of Payment Institutions in Ireland".

Safeguarding Users Funds

Every Payment Institution authorised in Ireland must satisfy the Financial Regulator that it has adequate arrangements in place to safeguard the funds of payment service users. Regulation 24(1) provides that "users funds" means funds that have been received by a payment institution from payment service users or through another payment service provider for the execution of payment transactions.

Authorised Payment Institutions will be required to safeguard customers funds either:

- (a) by the segregation of users funds in the manner described in the Guidance Note in an account with a credit institution; or invested in secure, liquid, low-risk assets; or
- (b) by covering by an insurance policy.

Additionally a Payment Institution that safeguards users' funds through the segregation of such funds must:

- ▣ conduct, on a regular basis, reconciliations between their internal accounts and records and those of any third parties with whom assets are held as set out above;
- ▣ promptly notify the Financial Regulator in writing of differences identified during the reconciliation that are material or recurrent in nature;
- ▣ where funds are held on the business day following receipt they must either be: (i) moved into a separate designated account with a credit institution or bank authorised in a third company, over which no security interest may be created, or (ii) invested in certain secure liquid assets; and
- ▣ ensure that the designation on a users' account held with a credit institution or a custodian sufficiently distinguishes the funds held in these accounts from funds belonging to the payment institution.

Regulation 24(6) provides that the Financial Regulator may limit the application to a payment institution of a requirement under the Regulation to users' funds of payment service users each of whom has deposited more than Euro 600 with the institution.

Full details relating to the reconciliations to be performed by Payment Institutions who use segregation to safeguard users funds are set out in the Guidance Note. Similarly, full details relating to the conditions on which insurance contracts or comparable guarantees may be used by a Payment Institution to safeguard user's funds are set out in the Guidance Note.

Funds cease to be users' funds when the cheque or other payable order is presented and paid by the eligible credit institution.

Outsourcing

A Payment Institution must notify the Financial Regulator in advance (at least 30 days before commencement) where it proposes to outsource any additional operational function relating to the provision of payment services. A Payment Institution must also notify the Financial Regulator as soon as possible where a change occurs or is due to occur in an outsourcing arrangement governing an important operational function relating to the provision of payment services.

Where a Payment Institution intends to outsource an important operational function it is required to ensure that:

- ▣ the outsourcing shall not result in the delegation of responsibility by senior management;
- ▣ the relationship and obligation of the Payment Institution towards its payment service users is not altered;
- ▣ it continues to comply with the conditions of authorisation imposed on it; and
- ▣ none of the other conditions imposed on the Payment Institution require removal or alteration.

The Financial Regulator can request further information regarding the nature of the outsourcing contract or impose specific conditions governing the arrangement.

The Payment Institution must also ensure that its Agents and branches inform payment service users of the outsourcing in place. A Payment Institution remains fully liable for any acts of its employees, or any Agent, branch or entity to which activities are outsourced.

Annual Accounts

A Payment Institution is required to submit to the Financial Regulator, in a timely manner and in any case not later than six months after the end of the relevant reporting period, annual audited financial statements in respect of the Payment Institution.

Record Keeping

A Payment Institution is required to keep all appropriate records for the purpose of these conditions for at least five years.

Reporting Requirements

A Payment Institution is also required to submit to the Financial Regulator a report on an annual basis, within 20 business days of the period end, setting out:

- ▣ details of the Payment Institution's regulatory capital requirement and the level of own funds held;

- ▣ the safeguarding arrangements the payment institution has in place;
- ▣ the number of Agents appointed; and
- ▣ separate accounting information on payment services where the Payment Institution carries out non-payment service business.

Where the level of own funds held by a Payment Institution falls below 120% of the level of own funds required, the Payment Institution is required to notify the Financial Regulator.

PART V - PASSPORTING PROVISIONS FOR PAYMENT INSTITUTIONS

General

Authorised Payment Institutions can provide services on a cross-border or branch basis in other Member States using passport rights acquired under the PSD; in other words, once a Payment Institution is authorised under the PSD in one Member State, it has the right to establish a branch in another Member State (a “branch passport”) or provide services in another Member State (a “services passport”). Note, however, that a Small Payment Institution cannot acquire passport rights under the PSD. Firms must be aware that if they take advantage of the transitional provisions, they cannot also apply for a passport to conduct cross-border activities.

The passport will apply to the provision of payment services only and not to other unrelated types of business activity in which a firm might choose to engage, and for which the firm would need to apply for any appropriate licences.

An *ad hoc* working group composed of representatives of competent authorities have issued guidelines entitled “Guidelines on Payment Services Directive Passport Notifications” which provide a framework for the co-operation of competent authorities with regard to the implementation of the passport notification provisions of the PSD.

An authorised Payment Institution in one Member State can also provide services in another Member State through an Agent established in the same Member State as the Payment Institution (using a services passport) or in another Member State (using its branch passport).

Application for a Passport

The procedures for making an application for a services passport and a branch passport are very similar, but there are additional procedures that need to be followed when passporting through an Agent.

Services Passport

Where a Payment Institution intends to commence providing payment services in another Member State (other through the use of an Agent/ branch established in that host Member

State) the Payment Institution shall notify the Financial Regulator in writing at least one month before the date that it proposes to commence providing payment services in the host Member State. The information provided should cover the payment services the firm intends to carry on, as well as the host Member State(s) where the payment services are to be performed. Within one month of receipt of same (assuming that the Payment Institution is authorised to carry out the relevant payment service(s)), the Financial Regulator will communicate the information to the competent authorities of the host Member State.

Upon communication of the notification by the Financial Regulator to the competent authority of the host Member State, the competent authority of the home Member State shall confirm to the Payment Institution that such a communication has been made. The Payment Institution may then provide the services concerned in the host Member State. The details of the passport will then be updated by the Financial Regulator on the Register on the home Member State.

Branch/Agent Passport

Where a Payment Institution intends to commence providing payment services in another Member State through the use of an Agent/ branch established in another Member State, the notification process is similar to that described above except that the Financial Regulator must also receive the names of the people responsible for managing any proposed branch, and details of that branch's organisational structure, as well as the host Member State(s) where the payment services are to be performed and it must assess the fitness and propriety of the management of the branch before making the notification to the host Member State. If the firm wishes to use an Agent in another Member State that is not already registered, then the applicant will also need to submit an Agent registration application form. The Agent must be registered before the passport notification can be made.

In this case, once the Financial Regulator has communicated the information to the competent authorities of the host Member State, it must allow the competent authority of the host Member State at least one month to provide details of any concerns with regards to money laundering or terrorist financing.

Article 17(6) of the PSD requires that if the competent authorities of the host Member State 'have reasonable grounds to suspect that, in connection with the intended engagement of the agent or establishment of the branch, money laundering or terrorist financing is taking place, has taken place or been attempted, or that the engagement of such Agent or establishment of such branch could increase the risk of money laundering or terrorist

financing, they shall so inform the competent authorities of the home Member State, which may refuse to register the Agent or branch, or may withdraw the registration if already made, of the Agent or branch.'

The Financial Regulator must take any information received from the host Member State into account, as well making its own assessment as to whether or not there are reasonable grounds to suspect money laundering or terrorist financing, or an increased risk of such activities, before deciding to approve the branch/ Agent and before updating the Register with the passport details.

Similarly if a Payment Institution authorised in another Member State wishes to engage an Agent or establish a branch in the State, and the Financial Regulator has reasonable grounds to suspect that, in connection with the intended engagement of the agent or establishment of the branch: (a) money laundering or terrorist financing is taking place, has taken place or has been attempted, or (b) the engagement of the agent or establishment of the branch could increase the risk of money laundering or terrorist financing, the Regulations provide that the Financial Regulator must so inform the competent authorities of the Payment Institution's home Member State.

Supervision of "Passporting" Payment Institutions

Under the PSD, it is the competent authority of the Member State in which the Payment Institution has its head office/ registered office which is responsible for supervising compliance by a Payment Institution with its capital requirements obligations, regardless of where it carries on its payment services within the Member State. This is not the case as regards the conduct of business requirements. The Financial Regulator will only be responsible for supervising compliance with the conduct of business requirements of the payment service providers in relation to payment services being provided from an establishment in the Ireland (for example, by an Irish authorised Payment Institution or a non-Irish Payment Institution exercising its right of establishment through a branch in Ireland), but not in relation to those provided on a cross-border basis from an establishment outside Ireland (for example, under a services passport).

The Financial Regulator is obliged to exchange information about authorised Payment Institution and Member State authorised Payment Institution's with other competent authorities in accordance with the PSD. In particular, the Financial Regulator is obliged to provide relevant competent authorities with all relevant or essential information relating to the exercise of passport rights by a Payment Institution, including information on breaches or suspected breaches of the PSD and of money laundering and terrorist financing legislation.

PART VI - BUSINESS CONDUCT RULES

Introduction

The conduct of business requirements include transparency of conditions requirements, information requirements for payment services and the rights and obligations in relation to the provision and use of payment services.

The Regulations provide for certain transparency requirements to be met by payment service providers. Such requirements are designed to ensure that payment service providers provide users with clear information that is proportionate to their needs to enable them to make well informed choices within the payment services market. In addition, the Regulations provide a simplified and fully harmonised set of rules with regard to rights and obligations linked to the provision and use of payment services. Payment service providers must respect standard rules governing certain key issues, including disputes between users and providers and conditions governing refunds

Application

The conduct of business requirements only apply in relation to a payment if the payer's payment service provider and the payee's payment service provider are both located in Member States, or if the payment service provider in the payment transaction is located in a Member State. The requirements also only apply to payment services denominated in euro or in a currency of a Member State outside the euro area.

In applying the information requirements, the Regulations make a distinction between:

- ▣ a payment transaction which is part of a series of successive payment transactions which is to be covered by a payment service agreement referred to as a "framework contract"; and
- ▣ a payment transaction which is a single payment transaction.

In each case the Regulations set out information to be provided before the contract is entered into, at the time the payment order is made and after execution of the transaction.

Corporate Opt-Out

Providers can agree a “corporate opt-out” where the customer is not a consumer nor a micro enterprise. A “micro-enterprise” is an enterprise as defined in Article 1, 2(1) and 2(3) of the Annex to Recommendation 2003/361/EC (the “Recommendation”). The Recommendation explains that the tests for determining whether an enterprise is a “micro-enterprise” are affected by whether the enterprise is “linked” to other enterprises, for example its fellow entities in a group of companies. The term “consumer” is not defined in the Regulations.

Key Requirements

- ▣ Charges: Payment service providers may not charge customers for providing information required under the Regulations, or for taking certain corrective or preventative measures specified. However a payment service provider and a payment service user may agree on charges for additional or more frequent information, or transmission by a means other than that specified if provided at the payment service user’s request. If a payment service provider imposes a charge for information, the charge shall be appropriate and in line with the payment service provider’s actual costs.

- ▣ General information to be supplied: Examples of information that must be provided include the content and provision of terms and conditions, the content and provision of remittance information and minimum disclosure requirements. The requirements will vary according to the type of transaction (single payment transaction, framework contract or payment transaction). The Regulations determine the information to be provided to the payee after execution of payment transaction, the information to be provided to payer after receipt of payment order and information to be provided for payee before the execution of payment transaction.

- ▣ Framework contract: For the purposes of the Regulations, the framework contract referred to means those terms which apply to payment services. A framework contract (i.e., the payment services terms) could form part of a broader contract containing provisions relating to non-payment services, but for the Regulations the framework contract should be taken as referring only to the payment services related elements of that broader contract. The Regulations specify the prior information and conditions to be provided to a payment service user, requirements in relation to the accessibility of information and conditions of the framework contract, changes in conditions of the framework contract, termination by the service user, information before execution on individual payment transactions, information for the payer on individual payment transactions and information for the payee on individual payment transactions. For

example the Regulations require payment service providers to give payment service users two months' notice of any proposed changes to the existing terms of a framework contract, together with the right to terminate the contract immediately and without charge if the user does not wish to be bound by the change. One exception to this rule is in relation to interest rate changes, which can take effect immediately and without prior notice to the payment service user in two cases: (a) where the change is more favourable to the user; and (b) where the change is based on a change to the reference interest rate disclosed in the framework contract and the framework contract provides for immediate application of any such change. The Regulations further provide that a customer must be allowed to terminate a contract upon the service of no greater than one month's notice and that no charge can be levied for the termination of framework contract after 12 months.

- ▣ Consent requirements for payments: The payer must have given express consent for every transaction. The bank must immediately reverse any unauthorised transactions.
- ▣ Execution time: From 1 November 2009, payments in the following cases must be processed within 3 days: (i) all payment transactions in euros, (ii) national payment transactions in the currency of the Member State concerned outside the euro zone and (iii) 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 euros. As of 1 January 2012, this must take place within one business day. For transactions in a Member State currency other than those listed above (e.g. a Danish kroner transfer between accounts in the UK) the Regulations allow agreement between PSP and customer of an execution time of up to four business days.
- ▣ Value dating: Value dating is the method for determining the date on which an amount that is credited or debited is taken into account for calculating interest on the balance of the payment account. After the implementation of the Regulations, the credit value date for the payee's payment account must be the same as the date on which the amount of the payment transaction is credited to the account of the payee's bank.
- ▣ Customer's use of payment instrument: 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, to take all reasonable steps to keep it secure, and to notify the issuer without undue delay of its loss, theft, misappropriation or unauthorised use.

- ▣ Obligations of issuers of payment instruments: Payments service providers issuing payment instruments are subject to various obligations such as ensuring that the personalised security features are not accessible to other persons and not sending unsolicited payment instruments (except as a replacement).
- ▣ Unauthorised/incorrectly executed payment transactions: The Regulations introduce a long-stop 13-month time limit after the date of debit for a customer to claim that a transaction was unauthorised or incorrectly executed; these claims should in any event be made without undue delay. Where a transaction is found to be unauthorised, the payment service provider has an obligation to immediately refund the amount of the transaction and, where applicable, restore the account to the state it would have been in had the transaction not happened.
- ▣ Refunds: Where a transaction is found to be unauthorised, the payment service provider has an obligation to immediately refund the amount of the transaction and, where applicable, restore the account to the state it would have been in had the transaction not happened. However in certain circumstances, a payer and payment service provider may agree in a framework contract that the payer has no right to a refund.
- ▣ Evidence on authentication and execution of payment transactions: It is for the payment service provider concerned to prove that the transaction was authenticated, accurately recorded, entered in the accounts and not affected by a technical breakdown or some other error or failure.
- ▣ Payer's liability for certain unauthorised payment transactions: A payer is liable for any financial consequences resulting from the use of a lost, stolen or misappropriated payment instrument if he or she has acted fraudulently or by failing, intentionally or by acting with gross negligence, to fulfil one or more of his or her obligations. If he or she has not acted fraudulently, the payer is only liable to bear the loss relating to unauthorised payment transactions on the payer's account, up to Euro75 in total.
- ▣ Amounts transferred and amounts received (no deductions): The Regulations stipulate that the full amount transferred by the payer should be credited to the account of the payee and none of the payment service providers (the payer's bank, the payee's bank and the payment intermediary) is allowed to deduct charges from the payment amount. Due to the requirement that the payee must receive the full amount of funds transferred, the PSD gives confidence to consumers and encourages them to use the cheaper option.

PART VII - HOW CAN DILLON EUSTACE ASSIST?

Our Experience

Dillon Eustace's Financial Services Department acts for asset managers and advisers, broker/dealers, investment banks, fund administrators, CFD providers and spread betting firms, pension consultancies, placing agents and intermediaries looking to use Ireland as a strategic base from which to serve a wider European client base or seeking to export their European based business to Ireland.

Services

The Financial Services Department can advise on all aspects of the Regulations and its application to investment firms providing investment services in Ireland such as:

- ▣ Establishment and authorisation of new Payment Institutions in Ireland – including advising on high level strategic matters, scope and application of the Regulations, co-ordination of application for authorisation including assistance/guidance in completion of the Application Form and Business Plan, advice on implementation of policies and procedures for compliance with ongoing organisational and conduct of business requirements;
- ▣ Cross-border passporting;
- ▣ Capitalisation and capital adequacy requirements;
- ▣ Drafting/reviewing all contracts, terms of business, policies and procedures manuals etc.;
- ▣ Liaising with the Financial Regulator on client's behalf on all aspect of PSD-related business and applications for authorisation; and
- ▣ Ongoing legal, regulatory and tax advice.

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