

EXPLANATORY MEMORANDUM TO
THE PAYMENT SERVICES REGULATIONS 2017

2017 No. 752

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations transpose the majority of Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market. The Financial Conduct Authority (“FCA”) is responsible for transposing other parts of the Payment Services Directive II (“PSDII”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 An impact assessment on the implementation of the PSDII has been submitted to the Regulatory Policy Committee for consideration and will be published once an opinion has been received.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 These Regulations are made to comply with the United Kingdom’s obligation to transpose PSDII by 13 January 2018. From that date the existing Payment Services Directive (Directive 2007/64/EC, “the PSD”) is repealed and is replaced by PSDII. Likewise, from that date these Regulations revoke and replace the Payment Services Regulations 2009, which transposed PSD. Significant parts of the content of PSD are unchanged in PSDII, and in order to assist those who are used to dealing with the Payment Services Regulations 2009, these Regulations reproduce the text of those Regulations where appropriate.
- 4.2 The replacement of PSD with PSDII also has a significant impact on the Second Electronic Money Directive (2009/110/EC, “EMDII”), which applied elements of PSD with modifications. PSDII amends EMDII so that it applies the equivalent provisions in PSDII. Part 2 of Schedule 8 to these Regulations makes amendments to the Electronic Money Regulations 2011, which transposed EMDII into legislation in the UK, to reflect that change.
- 4.3 Schedule 8 of the Regulations also makes amendments to other legislation. Where the Treasury has available specific powers in sectoral legislation to make these

amendments which are subject to the negative resolution procedure, they have used these. In other cases the Treasury have used section 2(2) of the European Communities Act 1972 to make the amendments. In the case of some of the amendments, a power in sector specific legislation is available but is exercisable only by the Secretary of State or is subject to the affirmative resolution procedure. In these cases (which are all minor consequential amendments) the Treasury have made the powers under section 2(2). The Treasury considers that this approach is preferable to the alternative of dividing the amendments between multiple instruments and applying the affirmative resolution procedure to some of them, which would result in a disproportionate amount of Parliamentary time being spent on consideration of a small number of minor consequential amendments.

- 4.4 Certain provisions of the Regulations come into force earlier than 13 January 2018 in order to allow the regulatory authorities and firms affected by the Regulations to prepare for the application of the PSDII regime from 13 January 2018.
- 4.5 The Economic Secretary to the Treasury submitted an Explanatory Memorandum on PSDII to the House of Commons European Scrutiny Committee and House of Lords European Union Committee on 2 September 2013.
- 4.6 The House of Commons European Scrutiny Committee sought greater clarity from the Economic Secretary to the Treasury on the Council working group negotiations before it was content to clear the Directive from scrutiny. To help reach an agreement on General Approach in Council, the Treasury was granted a waiver from the Scrutiny Reserve Resolution by the House of Commons European Scrutiny Committee whilst it secured improvements to the General Approach on the draft Directive.
- 4.7 Following a number of updates from the Minister to the House of Commons European Scrutiny Committee on 26 November 2014, the committee cleared the documents for scrutiny on 3 December 2014. The House of Lords European Union Committee cleared the documents for scrutiny on 17 March 2015.
- 4.8 A transposition note showing how these Regulations transpose PSDII into legislation in the United Kingdom is submitted with this Explanatory Memorandum and published with it on legislation.gov.uk.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is all of the United Kingdom.
- 5.2 The territorial application of this instrument is all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Economic Secretary to the Treasury, Stephen Barclay MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Payment Services Regulations 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 PSDII sets a common legal framework for payment services, providing a consistent set of rights and obligations for businesses and consumers making and receiving

payments. PSDII was published in the Official Journal of the European Union on 23 December 2015 and national governments are required to transpose the Directive ahead of it coming into force on 13 January 2018.

- 7.2 On 23 June 2016, the EU referendum took place and the people of the UK voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.
- 7.3 PSD forms part of a broader set of EU legislation aimed at facilitating payments within the EU by harmonising the relevant legal provisions. In particular, it aimed to improve the competitiveness of the EU by integrating national payments markets and to support the creation of a single market for retail payment services, by improving economies of scale and competition and increasing efficiency of payments in the EU. To achieve this, PSD had three main objectives: enhance competition; harmonise information disclosure; and standardise the rights and obligations for the provision and use of payment services in the EU, with a strong emphasis on customer protection.
- 7.4 PSDII seeks to build on these by creating a level playing field between all categories of payment providers, in turn increasing the choice, efficiency, transparency and security of payments. It does this by addressing: limitations to the scope of PSD; potential security risks in the payment chain; and consumer protection risks. It also reflects technological and market developments, such as the emergence of new electronic and mobile payments.
- 7.5 As PSDII is maximum harmonising EU legislation, there is limited discretion for the Treasury to depart from, or add to, the provisions of the Directive. The aims of PSDII are consistent with our overall approach to the regulation of payment services in the UK. The provisions of PSDII can be split into three categories: those which are maximum harmonising; those options that were available to the Treasury, and used, under the PSD and that it is continuing to use in these Regulations; and those where the Treasury is choosing to use the new flexibilities available to Member States under PSDII.
- 7.6 The maximum harmonising provisions in PSDII include extending the scope of certain provisions to a wider range of regulated transactions. This includes widening the geographical scope of where a payment transaction is made. Now payments that start in the EU but finish in a country outside of the EU, or vice versa are in scope, as are payment transactions in currencies of countries outside the EU.
- 7.7 PSDII narrows the scope of exclusions for payments through electronic communication networks (telecommunications), which, as clarified by the Regulations, also apply to intermediaries for such networks. It also narrows the scope of exclusions for limited networks and commercial agents.
- 7.8 PSDII also requires payment service providers providing payment account services online to allow access to the accounts (with consent of the account holder), except where they have an objective reason (such as fraud) to deny access. This will allow authorised or registered “third party” firms to deliver two types of services to customers. These services are: Account Information Services – that will be able to obtain transaction information from a customer’s online payment accounts and aggregate their payment data e.g. viewing all of your accounts in one place; and

Payment Initiation Services – that could trigger a payment operation that is normally available to customers through their online payment account.

- 7.9 A number of other additional consumer protections are provided for in PSDII. These include: a maximum processing time of 15 days for a full response to customers' complaints, an unconditional refund right for unauthorised transactions; increased security requirements for the authentication for electronic transactions; and for independent ATM operators to provide users with information on withdrawal charges (although the Treasury understand that this already happens in the UK).
- 7.10 Flexibility for national governments to depart from, or add to, the requirements in their implementation of PSDII is limited to particular provisions. Flexibilities that the Treasury previously used in implementing PSD, and that are implemented in these Regulations, include exempting certain institutions, such as credit unions and municipal banks, and reducing the regulatory burden on firms such as small payment institutions that process payment transactions below a monthly threshold of €3 million.
- 7.11 The Treasury also uses the flexibilities provided for in the Directive to provide additional protection for micro-enterprises (firms with fewer than five employees). This sees them treated as consumers in relation to the transparency and information requirements of PSDII, which, among other things, ensures that they are not charged for information. In addition, providers of low-value payment instruments need only provide users with information on the main characteristics of the payment service.
- 7.12 In addition, in the event of an unauthorised transaction, both the provider and user (payer) are expected to bear some level of liability for the losses. The Regulations reduce the liability for users for unauthorised use of payment instruments, where the payer has not acted fraudulently or with gross negligence, from £50 to £35.
- 7.13 Other key flexibilities that are implemented through the Regulations that were not previously used by the Treasury, or are new within PSDII, aim to support users and small businesses to make more informed, cost-effective decisions.
- 7.14 The Regulations also enable payment institutions to safeguard funds in a Bank of England settlement account, thereby supporting such firms to gain direct access to UK payment systems.
- 7.15 The Regulations also require that users are provided with a monthly statement of their payment transactions by service providers, free of charge, as a default. In addition, users will be able to choose whether they wish to change how they receive their statements through agreement with their service provider, providing greater flexibility to both users and service providers.
- 7.16 PSDII introduces a ban on retailers' ability to charge for the use of payment instruments, where their interchange fees are capped under the Interchange Fee Regulation, which includes the majority of consumer debit and credit cards. The Regulations go further by extending the ban on surcharging to all non-commercial retail payment instruments. This is intended to level the playing field across all non-commercial retail payment instruments and create a clearer picture for consumers in which they know the full price of the product/service they are purchasing upfront and are confident that there will be no additional charges when they come to pay using a particular payment instrument.

- 7.17 The FCA currently have a range of powers to make conduct rules for firms regulated under the Financial Services and Markets Act 2000 (including where those firms provide payment services). The Regulations extend these powers to firms undertaking payment activities that are solely regulated under PSDII (payment institutions) or the E-money Directive (e-money institutions) to ensure the FCA have the ability to enforce rules consistently, to the benefit of customers.

Consolidation

- 7.18 These Regulations revoke and replace the Payment Services Regulations 2009, which transposed PSD into legislation in the UK. Significant parts of the content of PSD is included unchanged in PSDII, and in order to assist those who are used to dealing with the Payment Services Regulations 2009, the text of those Regulations is included in these Regulations where appropriate.

8. Consultation outcome

- 8.1 The Treasury ran a public consultation on the transposition of PSDII, which opened on 2 February 2017 and closed on 9 March 2017. The consultation focussed on the key changes from PSD including changes to the scope of the Directive; access to payment systems and payment account services; the regulation of “third party” firms; and the government’s approach to PSDII’s flexibilities.
- 8.2 The Treasury received over 80 formal responses to the consultation. It has examined and considered each carefully. Respondents broadly agreed with the Treasury’s proposed positions.
- 8.3 The majority of substantive points raised related to provisions bringing into regulation new “third party” firms, the proposed approach to surcharging, and the interaction of PSDII with the Consumer Credit Act 1974.
- 8.4 Where there was confusion about interpretation of the Directive, the Treasury has provided clarification through industry engagement.
- 8.5 A more detailed analysis of the consultation outcome and the Treasury's policy response to the opinions expressed can be found at:
www.gov.uk/government/organisations/hm-treasury.

9. Guidance

- 9.1 It is not considered necessary to issue specific guidance in connection with these Regulations.
- 9.2 The regulator responsible for enforcing the majority of the provisions in the Regulations is the Financial Conduct Authority. It will be publishing a final Approach Document providing guidance on their regulatory approach to enforcing the Regulations. The Payment Systems Regulator, who enforce the access to payment systems provisions in the Regulations, will also be publishing a final Approach Document on their regulatory approach to enforcing the Regulations.
- 9.3 The Treasury has had extensive informal engagement with industry representatives during the negotiation and implementation phases of PSDII.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is expected to vary depending on whether businesses are already regulated to provide payment services under PSDI or whether they are coming into regulation as a result of changes to scope in PSDII. The Treasury's implementation approach aims to minimise the impact on UK industry in terms of their costs and protect customers.
- 10.2 The impact on the public sector is expected to affect local and central Government, as a result of the ban on surcharging.
- 10.3 An Impact Assessment will be published alongside the Explanatory Memorandum on the legislation.gov.uk website, when an opinion from the Regulatory Policy Committee has been received. It provides an estimated annual net cost to business of the transposition of PSDII.
- 10.4 The Treasury has been unable to submit a final Impact Assessment that has been through RPC scrutiny with the Regulations and Explanatory Memorandum because preparation of the assessment was delayed as a result of the General Election. The Treasury's decision to publish the regulations without a final Impact Assessment aims to ensure that industry and regulators have sufficient time to make the necessary changes required ahead of 13 January 2018, with some aspects of the Regulations coming into force in August 2017 to support industry and regulators' preparation.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses, to the extent that they provide payment services or benefit from an exemption.
- 11.2 However, the Treasury expects the impact on small and micro-enterprises to be relatively light because of the flexibilities Treasury has made use of to limit the impact on small businesses.
- 11.3 Further details are set out in the Impact Assessment.

12. Monitoring & review

- 12.1 The instrument contains a requirement for the Treasury to review the legislation, a minimum of every five years, and set out the conclusions of each review in a published report.
- 12.2 The first report must be published on or before 13 January 2023, will set out the objectives intended to be achieved by the regulatory provision; assess the extent to which those objectives are achieved; and whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

13. Contact

- 13.1 Matthew Alder at the HM Treasury Telephone: 020 7270 1408 or email: Matthew.Alder@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.