

EXPLANATORY MEMORANDUM TO
THE ELECTRONIC MONEY, PAYMENT CARD INTERCHANGE FEE AND
PAYMENT SERVICES (AMENDMENT) REGULATIONS 2023

2023 No. 790

1. Introduction

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The Financial Services and Markets Act 2023 (FSMA 2023) repeals retained EU law relating to financial services. This enables the government to deliver a Smarter Regulatory Framework for financial services. Retained EU law will be repealed and replaced with rules set by our independent and expert regulators, operating within a framework set by government and Parliament.

2.2 This instrument ensures that the Financial Conduct Authority (FCA) has sufficient rulemaking powers, and that the Payment Systems Regulator (PSR) has sufficient powers of direction, in relation to their respective areas of retained EU payments legislation. This is necessary for the regulators to be able to replace retained EU law in line with their respective responsibilities.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 When the UK left the EU, the body of EU legislation that applied directly in the UK at the point of exit was transferred onto the UK statute book by the European Union (Withdrawal) Act 2018. This is known as “retained EU law”.

6.2 The relevant EU legislation includes the Payment Services Regulations 2017, the Electronic Money Regulations 2011, the Interchange Fee Regulation 2015, and the Payment Card Interchange Fee Regulations 2015. These are the areas of retained EU payments legislation which the government expects the FCA and PSR to take

responsibility for replacing through the enhanced powers provided for in this instrument, acting within a framework set by government and parliament.

- 6.3 The Financial Services and Markets Act 2023 contains a number of new legislative powers, which work together as a set of tools as the government repeals retained EU law in order to deliver a Smarter Regulatory Framework for financial services.
- 6.4 These include a power to modify legislation, providing HM Treasury with a power to make targeted modifications to retained EU law during the transitional period between the Act becoming law and when retained EU law is repealed.
- 6.5 The ability of the FCA and the PSR to establish regulatory requirements in relation to their respective areas of retained EU payments law is currently restricted.
- 6.6 The FCA derives its existing rulemaking powers for payment services and electronic money through the Payment Services Regulations 2017 and Electronic Money Regulations 2011. This rulemaking regime is based on the FCA's powers in the Financial Services and Markets Act 2000, but is narrower in scope, in that the FCA is only able to exercise its rulemaking capability where it has acted or is acting in the same way for authorised persons.
- 6.7 The PSR operates primarily under its domestic framework in the Financial Services (Banking Reform) Act (FSBRA) 2013 (FSBRA), which enables it to establish regulatory requirements through powers of direction. These powers of direction allow the PSR to require or prohibit the taking of specified action by a regulated person, or set standards to be met, and are in effect the PSR's proxy rulemaking power. The PSR is also responsible for some areas of payments policy governed by retained EU law, notably under the Interchange Fee Regulation 2015, but its powers of direction in relation to this, housed in the Payment Card Interchange Fee Regulations 2015, are narrower in that they can only be used as a means of enforcing compliance.
- 6.8 This instrument amends the Electronic Money Regulations 2011 and the Payment Services Regulations 2017 to ensure that the FCA has sufficient rulemaking powers in relation to its retained EU payments law. It also amends the Payment Card Interchange Fee Regulations 2015, and the Payment Services Regulations 2017, to ensure that the PSR has sufficient powers of direction in relation to its retained EU payments law.
- 6.9 This SI uses the powers conferred by Section 3 and Section 85(2) of the Financial Services and Markets Act 2023 to make transitional amendments for the purpose set out in Section 3(2)(j) of providing for efficient and effective regulatory arrangements in relation to the provision of financial services or the operation of financial markets.
- 6.10 The rulemaking and direction making powers which are amended by this instrument form part of retained EU law and are repealed by FSMA 2023. In due course, the government will commence the repeal of these instruments, and expects to restate the relevant rulemaking and direction making powers into domestic legislation.

7. Policy background

What is being done and why?

- 7.1 This instrument forms part of HM Treasury's programme to deliver the Smarter Regulatory Framework for financial services. This instrument ensures that the FCA and the PSR have sufficient powers to set regulatory requirements in relation to their respective areas of retained EU payments legislation, which are presently restricted in

the way that they can be used. The FCA is currently only able to make rules for payments and e-money firms where it has or intends to act in the same way for authorised persons, whilst the PSR is only able to issue directions for the purpose of enforcing compliance. The amendments made in this instrument will remove these constraints to enable the FCA and PSR to take responsibility for replacing retained EU law in line with their respective responsibilities.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.2 The FCA's rulemaking power for payments and e-money firms, within the Payment Services Regulations 2017 and Electronic Money Regulations 2011, is currently restricted in that the FCA is only able to make rules where it has acted or will act in the same way for authorised persons. This means it is prevented from making certain rules for the payments sector.
- 7.3 The PSR's power of direction in relation to the Interchange Fee Regulation 2015, which is housed within the Payment Card Interchange Fee Regulations 2015, is currently limited to the purpose of enforcing compliance. The PSR is therefore unable to set standards in relation to interchange fee policy. The same limitation applies to the PSR's powers in relation to Regulation 61 of the Payment Services Regulations 2017, pertaining to ATM withdrawal charges.

What will it now do?

- 7.4 The Payment Services Regulations 2017 and the Electronic Money Regulations 2011 will be amended to remove the restrictions on the FCA's functions and additionally extend aspects of the FCA's existing powers in the Financial Services and Markets Act 2000 (FSMA) to make rules in relation to client money and safeguarding assets, the control of information, and the appointment of auditors. This will ensure that the FCA has equivalent powers to those for authorised persons, enabling it to make rules for payment services and e-money as retained EU law is repealed. Minor technical amendments are also made to ensure that relevant amendments which were made to FSMA by FSMA 2023, in relation to regulators' accountability, also apply to the FCA where it is exercising its functions under these Regulations. This includes the requirement for the FCA to have regard to the net zero emissions target, as part of its regulatory principles.
- 7.5 The Payment Card Interchange Fee Regulations 2015 will be amended to give the PSR an enhanced power of direction in relation to the Interchange Fee Regulation 2015, which is the primary piece of retained EU legislation that the PSR is competent for. This will align the PSR's powers of direction with those under its domestic framework in FSBRA, which enable it to require or prohibit the taking of specified action by a regulated person, or set standards to be met. This will allow the PSR to set regulatory requirements in relation to interchange fees and related business rules for the card market, which are covered in the current scope of the Interchange Fee Regulation, when retained EU law is repealed. The Payment Services Regulations 2017 will also be amended to similarly grant the PSR an enhanced power of direction in relation to Regulation 61 (information on ATM withdrawal charges) of the Payment Services Regulations 2017, for which it is responsible, to enable it to set regulatory requirements.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not trigger the statement requirements under the European Union (Withdrawal) Act.
- 8.2 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because it related to the modification of retained EU law under HM Treasury's programme to deliver a Smarter Regulatory Framework for the UK.

9. Consolidation

- 9.1 There are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

- 10.1 The proposals to modify these pieces of retained EU law for the FCA and the PSR, in order to align their powers in relation to these laws with their powers under their existing domestic regulatory frameworks, was consulted on in the 'Payments Regulation and the Systemic Perimeter' consultation, which HM Treasury published in July 2022 and remained open for three months. The consultation received 23 responses. Respondents were almost universally supportive of the approach proposed.
- 10.2 A draft version of this instrument, which contained the provisions relating to the FCA's rulemaking powers, was also published in December 2022.

11. Guidance

- 11.1 HM Treasury does not propose to provide any guidance in relation to this instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the SI does not directly affect businesses. The SI makes technical modifications to the FCA and PSR's existing regulatory regimes in retained EU law to ensure that they have sufficient powers in relation to their existing remits of retained EU payments legislation. It does not change firm facing rules or establish new burdens on businesses. The measure therefore does not qualify as a 'regulatory provision', as it does not impose any new requirements on business, nor does it directly secure compliance with any requirements for businesses.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.
- 13.2 The amendments made by this instrument are not expected to have an impact on small businesses, and therefore no action is needed to mitigate the impact on them.

14. Monitoring & review

- 14.1 These provisions are subject to ongoing review as part of HM Treasury's work to reform and repeal financial services REUL in order to establish a comprehensive FSMA model of regulation.

- 14.2 The instrument does not include a statutory review clause, and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Economic Secretary to HM Treasury (Andrew Griffith) has made the following statement:

It is not proportionate to include a review clause in this instrument because the SI does not directly affect businesses, as set out in paragraph 12.

15. Contact

- 15.1 Naomi Wang at HM Treasury (Naomi.Wang@HMTreasury.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Laura Mountford, Deputy Director for Payments and Fintech at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Andrew Griffith, Economic Secretary to HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.