

# Payment Services and the European Labyrinth

The new directive on payment services (the Payment Services Directive 2007/64/EC, or PSD) introduces a set of rules regulating provision of payment services. However, this is not the only act of the European legislators which directly affects the conduct of business of payment service providers (PSPs). Other pieces of European legislation which may apply to PSPs can be broadly divided into two groups:

- provisions awarding protection to consumers; and
- provisions aimed to counteract money laundering and terrorism.

Below, we present a table summarising the scope of certain EU directives and regulations which can apply to PSPs and overlap with the PSD. As you will see a labyrinth of different, often cross-cutting provisions may bring a headache to the industry and its advisers. A number of those EU laws have already been implemented into the laws of the EU Member States and, unlike the PSD, they are already in force.

Our table looks at the following aspects of international regulation:

- Which types of entity providing payment services may be affected by the legislation
- What type of business triggers the operation of the legislation, and what the geographical rules are - will you be affected if you deal with customers located in that country, or if you have a branch there, or what is the test?
- The principal features of the regulatory regime arising under the legislation
- What powers/limits on powers apply to a regulator outside the service provider's home country
- Whether the legislation is a full-harmonisation measure (ostensibly prohibiting "gold-plating", ie local supplementary rules).

These questions, which are important to firms providing financial services in a single EU market, are unfortunately not always answered with clarity by the legislation.



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| Directive/<br>Regulation                                   | Who is caught?  | Triggers  | Main areas of<br>regulation  | Role of foreign<br>regulator   | Full/minimum<br>harmonisation                                  |
|--|---|---|--|--|--|
| Payment Services Directive (PSD) (2007/64/EC)              | <ul style="list-style-type: none"> <li>• Credit institutions;</li> <li>• electronic money institutions (ELMIs); and</li> <li>• other payment institutions (PIs) authorised under the PSD to provide payment services (e.g. telecommunication operators, stores or money transfer institutions).</li> </ul> <p>NB: mandatory for non-credit institutions/ELMIs to become PIs; some exemptions available.</p> | <p>For conduct of business rules -</p> <p>provision of payment services in euro or other currencies of the EU Member States when both of the payer's PSP and the payee's PSP are located in the EU.</p> <p>For rules on authorisation - providing of payment services in the EU by PIs.</p> <p>Customer's location is irrelevant.</p> | <ul style="list-style-type: none"> <li>• Information requirements;</li> <li>• rights and obligations of customers and PSPs;</li> <li>• system of authorisation for PIs.</li> </ul>                 | <p>Passporting available for PIs.</p> <p>Unclear role of host state regulator for foreign branches of the PIs.</p> <p>No separate regulatory regime for the credit institutions or electronic money institutions – standard regulatory rules under the Banking Directive should apply.</p> | <p>Maximum harmonisation with certain elections available.</p> |
| Regulation on cross-border payments in euro (2560/2001/EC) | <ul style="list-style-type: none"> <li>• PSPs; and</li> <li>• EU-branches of non-EU PSPs</li> </ul> <p>NB: the Regulation uses the term "Institution" instead of "PSP" and its scope as regards entities</p>  | <ul style="list-style-type: none"> <li>• Cross-border credit transfers in euro through a PSP in one Member State to a beneficiary at a PSP in another Member State;</li> <li>• cross-border electronic</li> </ul>   | <ul style="list-style-type: none"> <li>• Charges levied by the PSPs on cross-border payments in euro up to EUR 50,000 within the EU are the same as the charges levied for intra- State</li> </ul> | <p>No specific provisions on supervision.</p> <p>Rules under the PSD and the relevant industry directives (e.g. Banking Directive) should most likely apply.</p>   | <p>Maximum harmonisation</p>                                   |

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|  | is not precisely defined.   | <p>payment transactions in euro including cross-border cash-withdrawals; and</p> <ul style="list-style-type: none"> <li>cross-border cheques in euro.</li> </ul> <p>Customer's location is irrelevant.</p>                             | <p>payments.</p> <ul style="list-style-type: none"> <li>Information requirements regarding charges and identification numbers (IBAN and BIC) – covered also by the PSD.</li> </ul>                   |  |                               |
| E-commerce directive (2000/31/EC)                                  | PSPs established in a Member State and providing information society services.  | Providing payment services in a way which constitutes provision of an information society service, i.e. a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. | <p>Rules ensuring the free movement of information society services, including:</p> <ul style="list-style-type: none"> <li>information requirements;</li> <li>rules on placing of orders.</li> </ul> | <p>No specific provisions on supervision.</p> <p>Rules under the PSD and the relevant industry directives (e.g. Banking Directive) should most likely apply.</p> | Minimum harmonisation         |
| Protection of consumers in respect of distance contracts directive | <p>Suppliers entering into distance contracts with consumers located in the EU.</p> <p>PSPs are beyond the scope of this directive,</p> | Execution of distance contracts, i.e. contracts concerning goods and services concluded between a supplier and consumer through a use of   | <ul style="list-style-type: none"> <li>Information obligations;</li> <li>right of withdrawal from a distant contract;</li> </ul>   | <p>No specific provisions on supervision.</p> <p>However, certain public bodies, consumer or</p>   | Minimum harmonisation         |

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| (97/7/EC)   | however PIs may in certain situations be caught (in particular, when they are selling goods or provide other services under distance contracts).  | the means of distant communication.<br><br>However, this directive does not apply to financial services, including services of payment nature (i.e. most likely payment services under the PSD). The directive could apply to the delivery of goods or services while the PSD applies to the payment leg of a transaction. | <ul style="list-style-type: none"> <li>restrictions on use of certain means of distant communication;</li> <li>restrictions on unsolicited supply.</li> </ul>   | professional organisations should be authorised to take action in front of public courts or administrative bodies to assure compliance with the directive.   |                               |
| Distant marketing of consumer financial services directive (2002/65/EC) | Suppliers (including PSPs) entering into distance contracts concerning financial services with consumers located in the EU.<br><br>Financial services include services of a banking, credit, insurance, personal pension, investment or payment | Execution of distance contracts, i.e. contracts concerning financial services concluded between a supplier and consumer through use of the means of distant communication.   | <ul style="list-style-type: none"> <li>Information obligations;</li> <li>right of withdrawal from a distant contract;</li> <li>restrictions on use of certain means of distant communication;</li> <li>restrictions on</li> </ul> | No specific provisions on supervision.<br><br>However, certain public bodies, consumer or professional organisations (most likely located in a jurisdiction of a consumer) should be authorised to take action in front of public courts or administrative | Minimum harmonisation         |

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|  | nature.  |   | unsolicited services.  | bodies to assure compliance with the directive.<br><br>In respect of the PSPs, the usual regulators may want to assure compliance with this directive.   |  |
| Unfair Commercial Practices Directive (2005/29/EC) | Any trader dealing with consumers located in the EU, including PSPs. | Entering into commercial transactions with consumers and exercising unfair business-to-consumer commercial practices (including any acts, omissions, course of conduct or representations, commercial communications, by a trader directly connected with the promotion, sale or supply of a product to consumers). | <ul style="list-style-type: none"> <li>Prohibition of unfair commercial practices;</li> <li>definitions of different types of unfair commercial practices;</li> <li>enforcement measures and penalties.</li> </ul> | Courts or administrative authorities should have powers to counteract unfair commercial practices (also located in a jurisdiction of a consumer).<br><br>In respect of PSPs, the usual regulators may want to assure compliance with this directive. | Maximum harmonisation with a transitional period |
| Consumer Credit Directive (87/102/EEC)             | Any trader granting credit to consumers (which may include PSPs).    | Granting credit to a consumer located in the EU.  | <ul style="list-style-type: none"> <li>Measures protecting consumer while</li> </ul>   | Authorities responsible for authorisation should have supervision.   | Minimum harmonisation                            |

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|   |   |  | <ul style="list-style-type: none"> <li>obtaining consumer credits;</li> <li>• authorisation for offering or arranging consumer credits.</li> </ul>                       | Not clear on the cross-border question.                          |  |
| Markets in financial instruments directive (MiFID) (2004/39/EC) | Investment firms and credit institutions providing investment services (which may include PSPs if providing investment services). | Providing investment services. No clear rules on location of service (characteristic performance?)   | <ul style="list-style-type: none"> <li>• Authorisation rules for investment firms;</li> <li>• conduct of business rules;</li> <li>• information requirements.</li> </ul> | Strict rules limiting jurisdiction of host state regulators.     | Maximum harmonisation with certain elections available |
| Anti-money laundering directive (2005/60/EC)                    | Different types of entities located in the EU and EU branches of non-EU entities facilitating payments, including PSPs.           | <ul style="list-style-type: none"> <li>• Establishing a business relationship;</li> <li>• carrying out occasional transactions amounting to at least EUR 15,000;</li> <li>• accepting orders to</li> </ul> | Rules preventing money laundering and terrorist financing.   | Special regulatory regime. No clear home/host state distinction. | Minimum harmonisation                                  |

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|  |   | <p>carry out suspicious transactions.</p> <p>Location of customer is irrelevant.</p>  |   |   |   |
| <p>Regulation on information on the payer accompanying transfers of funds (1781/2006/EC)</p> | <p>PSPs established in the EU receiving or sending payments.</p> <p>Indirectly applicable to non-EU PSPs when sending payments to EU PSPs.</p> <p>NB: Separate definition of PSP.</p> | <p>Transfers of funds in any currency which are sent or received by a PSP established in the EU.</p> <p>NB: Different definition of transfer of funds from payment services under the PSD, although impact of differences is unclear.</p> | <ul style="list-style-type: none"> <li>Information obligations aimed to prevent, investigate and detect money laundering and terrorist financing;</li> <li>obligations on the PSPs of the payers and the payees.</li> </ul> | <p>General obligation of Member States to monitor compliance with the Regulation.</p> <p>Most likely authorities appointed under the anti-money laundering directive. No clear home/host state distinction.</p> | <p>Maximum harmonisation (with limited elections available)</p> |

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