

# Payment Services Directive - Top 10 questions

The new Payment Services Directive (2007/64/EC - the PSD) has to be transposed into legislation by EU Member States no later than 1 November 2009. The generous timetable will be needed: as with many new directives, this one raises a number of problems of interpretation, and the time will be needed to sort out the right outcomes in the implementing legislation. This paper looks at the top 10 troublespots in the PSD. No doubt other issues will surface as banks and other affected bodies become more familiar with its provisions and start their PSD transition projects.

## 1. Are securities and investment firms "payment institutions"?

The PSD says that if you are providing "payment services" as defined in the Annex to the PSD, you need to obtain a licence as a "payment institution" unless you are a credit institution, an electronic money institution, certain types of government body or a low-volume service provider. Unfortunately the net is cast very wide in the Annex: as customers of securities and investment firms typically hold cash accounts with their firm, there is a danger that such accounts could be characterised as "payment accounts" bringing the firms within the scope of the PSD.

Helpfully the recitals to the PSD indicate that the application of the PSD should be confined to payment service providers whose main activity consists of payment services.

## 2. Presumably retailers are outside the PSD's scope?

Many payment-related activities of retailers are carved out of the PSD, but there are some apparent gaps. Issue and redemption of gift cards should be out of scope, depending on the range of stores and service providers which accept the card. But the case of payment of a deposit against an order is more troublesome: the PSD exempts this if the payer pays the deposit in cash but there are arguments that can be made that other forms of deposit could be deemed to involve a payment service.

The argument will, one hopes, be seen to be contrived, and the list of "payment services" interpreted purposively so as to catch genuine payment intermediaries rather than sellers of goods and services. However, if a payment is made to an intermediary of some sort it is rather more likely that the PSD applies, and retailers may need to review how their payment and credit arrangements are structured so as to avoid inadvertently falling within the PSD.

## 3. Would the issue and processing of direct debit mandates be regarded as a payment service?

There may be debate about what counts as a "payment instrument" - for example, direct debit mandates and PINs. A person who issues and/or acquires such instruments would be providing a payment service and apparently need a PSD licence. This seems a remarkable result and an unintended consequence of the PSD.

### Key Issues

**Are securities and investment firms "payment institutions"?**

**Presumably retailers are outside the PSD's scope?**

**Would the issue and processing of direct debit mandates be regarded as a payment service?**

**Do banks have to worry about the PSD?**

**So does this mean that clients will have to be re-papered, as with MiFID?**

**Are banks operating "payment systems"?**

**Does cash deposited in a night-safe have to be credited on the night of receipt?**

**How will the PSD definition of "business day" work?**

**What are the implications of interbank liability?**

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Questions like this may be resolved through the process being established by the European Commission, which is setting up "transposition workshops" to help Member States with points of interpretation and FAQ as they come to implement the PSD.

#### 4. Do banks have to worry about the PSD?

Although banks are exempt from the requirement to be licensed as payment institutions, they are nonetheless subject to the conduct of business regulations under the PSD. These are likely to require extensive changes to terms and conditions and operational requirements.

#### 5. So does this mean that clients will have to be re-papered, as with MiFID?

EU directives very rarely contain "grandfathering" provisions and the PSD is no exception. This means that a bank which has not implemented PSD-compliant terms and conditions by 1 November 2009 might be regarded as in breach of the rules which the FSA will introduce to ensure PSD compliance. The real problems with MiFID repapering arose from MiFID's requirements about "express consent" and such like - the PSD is less particular and in many cases it may be possible to avoid getting customer signatures. However, consumer protection requirements arising under the general law or other directives may create some obstacles.

While it is probably an exaggeration to describe the PSD as a mini-MiFID there are certainly some parallels and banks will find it useful to draw on the experience of their MiFID project teams.

#### 6. Are banks operating "payment systems"?

This is an important question, because the PSD cuts back the freedom of payment system providers to pick and choose their customers. Access criteria have to be objective, non-discriminatory and proportionate. Rules like this are commonplace with regard to market infrastructures, but the definition of "payment system" in the PSD is very widely drawn (and it has similarity to the definition of a "system" in the Settlement Finality Directive, which in theory can apply to two-party contractual arrangements). Banks may wish to consider whether they are providing any "funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions" - if so, they are likely to be caught by the new access rules.

#### 7. Does cash deposited in a night-safe have to be credited on the night of receipt?

The PSD requires that if a consumer places cash on a payment account, his payment service provider must make the amount available and value dated immediately after receipt of the funds. On one reading this could mean that banks have to back-credit the receipt to the day of deposit, even if the deposit was made after business hours.

However, the PSD also contains a rule (in a different context) allowing the payment service provider to establish a cut-off time, and assuming that the PSD is transposed purposively it will be open to banks to carry out the credit on the following business day.

#### 8. How will the PSD definition of "business day" work?

The PSD defines business days as a day on which the payment service provider of the payee or payer involved in the execution of the payment transaction is open for business as required for the execution of the payment transaction. Stripping away the Euro-ese, this means that if a payment service provider has an obligation, performance is excused if its operations centre essential for execution is experiencing a bank holiday. Clearly that is a different approach from that taken in typical banking and commercial documents.

Banks and others will therefore wish to consider the circumstances in which the PSD imposes a strict timetable for performance - typically for credit transfers - and whether that is compatible with their documentation. This is likely to affect banks in relation to payment services such as paying and escrow agency, syndicate agents and other intermediation arrangements, but potentially other payment transactions covered by the PSD.

#### 9. What are the implications of interbank liability?

The PSD requires Member States to implement a law whereby payment service providers or intermediaries who have caused a liability to another payment service provider must compensate the other provider. Where this rule will leave contractual exclusions of liability or indemnity clauses with limited scope is not yet clear, but the PSD is a "maximum harmonisation" directive which allows Member States very limited scope to cut back or supplement the directive's provision.

**10. Are one-leg-out payments out of scope?**

The conduct of business rules mandated by the PSD apply only where the payment service providers of both payer and payee are located in the EEA. This leaves out of scope the type of payment referred to as "one-leg-out" payments where one of the payment service providers is outside Europe. In practice, though, it might be challenging to develop systems and controls which distinguish between one-leg-out and two-legs-in payments. Furthermore, it is understood that the European Commission is keen to have Member States treat one-leg-out payments in the same way as PSD payments. Although the PSD is a "maximum harmonisation" directive, the PSD does not legislate in relation to one-leg-out payments, to Member States are free to follow the Commissions lead. This may therefore be one to watch.

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