

The Payment Services Regulations 2009 and the Consumer Credit Act 1974

When the information requirements under the Payment Services Regulations 2009 (PSR) commence in the United Kingdom on 1 November 2009, payment service providers will need to ensure that the documentation they provide to customers - such as framework contracts and statements of account - comply with the requirements of the PSR.

It is also important that payment service providers recognise that the PSR do not exist in a legislative vacuum and that they will need to continue to comply with other consumer protection laws.

This client briefing seeks to highlight the continuing role of the Consumer Credit Act 1974 (CCA) in the provision of payment services linked to CCA-regulated loans (such as a credit cards) and the risks to payment service providers/credit providers should efforts to comply with the PSR unintentionally result in non-compliance with CCA.

Framework contracts and CCA disclosure

Where the contract under which a payment service is provided is also a "regulated agreement" under the CCA (such as a credit card contract), Regulation 34 of the PSR operates to excuse a payment service provider from complying with a number of PSR disclosure requirements.

However, payment service providers who are also providers of CCA-regulated credit cards should ensure that in taking advantage of the Regulation 34 exemptions, they do not inadvertently compromise the enforceability of their credit card agreements.

Take, for example, Regulation 40 PSR. This regulation operates such that certain information listed in Schedule 4 to the PSR must be provided to the payment service user in good time before becoming bound to the framework contract. Regulation 34(b) limits the information required to be in a framework contract if the framework contract is also a CCA-regulated agreement to the following:

"Where relevant, details of the interest and exchange rates to be applied or, if reference interest and exchange rates are to be used, the method for calculating the actual interest and the relevant date and index or base for determining such reference interest or exchange rates".

Key Issues

The PSR do not exist in a vacuum

Consider application of other consumer protection legislation

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Payment service providers should, however, bear in mind that where a framework contract for payment services is found within a CCA-regulated agreement, the content of the CCA-regulated agreement must continue to comply with the strict, prescriptive requirements of the of the Consumer Credit (Agreements) Regulations 1983 (Agreements Regulations). As regards the disclosure of interest rates, the Agreement Regulations require a credit contract for a credit card to disclose the following information:

"The rate of interest on the credit to be provided under the agreement or, where more than one such rate applies, all the rates in all cases quoted on an per annum basis with details of when each rate applies."

Given that the Agreements Regulations require disclosure of the actual rate/s it is not sufficient (unlike the PSR) to disclose only reference rates and the method for calculating the applicable rate. Were a credit card agreement only to satisfy the lower disclosure standard permitted by the PSR, the credit card agreement would not comply with the Agreements Regulations and would not contain all prescribed terms required by Section 61 CCA. This would result in the credit card agreement being "improperly executed" under section 61 CCA - the effect of which would be to render the credit card agreement unenforceable without a court order (see Section 127 CCA).

As regards exchange rate disclosure, the Agreements Regulations operate to prevent the interspersing of prescribed terms with information about exchange rates (or reference rates). Therefore, in order to comply with the PSR, although such exchange rate information must be provided to the customer in the framework contract, it must be kept separate from, and not intersperse, the credit information prescribed by Agreements Regulations. Failure to do so would render the credit card agreement "improperly executed" under section 61 CCA and unenforceable without a court order.

Account statements and CCA disclosure

A payment service provider must provide payment account statements that include the information required under Regulation 45(2) PSR. However, in the case of credit card contracts, the PSR only requires the information listed under Regulation 45(2)(d) - namely the exchange rate used in the payment transaction by the payer's payment service provider and the relevant amount of the payment transaction after the currency conversion.

Payment service providers should bear in mind, however, that the content requirements for account statements produced for credit cards must comply with the CCA, the Consumer Credit (Running-Account Credit Information) Regulations 1983 and the Consumer Credit (Information Requirements and Duration of Licenses and Charges) Regulations 2007. None of the provisions in those regulations require statements to include the information required by Regulation 45(2)(d) PSR. Notably, however, the CCA regulations do not expressly forbid the inclusion of information required by Regulation 45(2)(d) PSR. Therefore statements for credit card contracts must be amended to include the information listed in Regulation 45(2)(d).

Other PSR exemptions

Credit card providers should note that Regulation 52 PSR disapplies a number of PSR requirements where the contract for the provision of a payment service is also a CCA-regulated agreement. The regulations that are disapplied include regulations addressing liability for unauthorised transactions. Although the disapplication of certain provisions of the PSR operates such that a credit card provider will not be required to amend existing credit card terms to address liability, a credit card provider should bear in mind that the provisions regarding liability for unauthorised transactions under the CCA are not identical to the liability provisions under the PSR and, therefore, if the credit card provider offers other (non-credit) payment accounts, it will be required to comply with two liabilities systems - one for credit cards under the CCA and another for other non-credit card payment accounts provided by the PSP.

Refund rights

Under Regulations 63(1), 63(2) and 64 PSR, a payment service provider must refund a payer where a payment is initiated by a payee and request for a refund is made by the payer within 8 weeks of the debit in circumstances where:

- the authorisation under Regulation 55 did not specify the exact amount when the authorisation was given; and
- the transaction exceeds the amount the payer could reasonably have expected taking into account the payer's previous spending pattern, the contract and the circumstances of the case.

Credit card policies addressing refund rights should be amended to reflect the requirements of the PSR. Further, where credit card providers do not currently monitor the spending patterns of credit card holders, such providers should note that the PSR impose a legislative obligation on a credit card provider to undertake such monitoring.

The Consumer Credit Directive

In April 2008 the European Parliament and the Council of the European Union adopted Directive 2008/48/EC on credit agreements for consumers (Consumer Credit Directive). The Consumer Credit Directive is to be implemented into the national law of member states by May 2010.

Given that draft regulations implementing the Consumer Credit Directive are yet to be published, it is not yet possible to determine the extent to which the risks highlighted above (in the context of the CCA) will diminish or grow once the Consumer Credit Directive has been implemented into UK law. However, despite this current uncertainty, it is without a doubt that consumer credit providers will need to ensure that in drafting amendments to documentation to comply with the Consumer Credit Directive, they will need to appreciate that just as the PSR do not exist in a vacuum, neither will the regulations implementing the Consumer Credit Directive.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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