

Implementation of the Payment Services Directive in Belgium

Introduction

The rules implementing the Payment Services Directive (the "PSD") into Belgian law have now all been published in the Belgian State Gazette. They consist of:

- (1) the Law of 21 December 2009 on the Status of Payment Institutions, which transposes the prudential regime for payment service providers (Title II of the PSD); and
- (2) the Law of 10 December 2009 on Payment Services, which transposes the conduct of business rules applicable to the provision of payment services (Title III and IV of the PSD).

The Law on Payment Institutions enters into force retroactively on 1 November 2009; the Law on Payment Services will enter into force on 1 April 2010.

Whereas the prudential regime for payment services providers is very much a copy of the one provided for by PSD, some local flavour has been added to the conduct of business rules. Non-Belgian payment service providers providing payment services into Belgium will therefore need to check whether, and to what extent, Belgian conduct of business rules differ from the PSD conduct of business rules and adapt their terms and conditions and/or processes. Belgian payment service providers will find this less troublesome, since the local flavour is inspired by pre-PSD payment regulations in Belgium.

Local flavour added to PSD conduct of business rules

Breaking with a tradition of simply copying out financial services directives, the Belgian legislator has included some Belgium specific items when implementing the PSD.

First of all, several of the transposition options open to Members States were exercised. Belgium has for example used the option to shorten maximum execution times for purely national payment transactions. This type of payment transaction will need to be executed the same business day, in the case of electronically-initiated payment transactions between two payment accounts where the payer and the payee payment service provider is the same entity. Furthermore, the possibility to extend the maximum execution time to three business days will not be applicable to

Key Issues

Local flavour added to business rules

Implementation rules broaden in-scope transactions

Belgian rules go above and beyond what PSD requires

Prudential regime in line with PSD

Passporting of EEA Payment Institutions aligned to banking regime

Clarity for non-EEA payment service providers

If you would like to know more about the subjects covered in this publication or our services, please contact:

[Yves Herinckx](#) +32 2 533 5901

[Bert Verdoodt](#) +32 2 533 5049

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance, Avenue Louise 65, Box 2,
1050 Brussels, Belgium
www.cliffordchance.com

national payment transactions. An exception exists for national payment transactions initiated by the payee. For a general overview of the transposition options exercised by Belgium, see the annex attached.

Secondly, certain conduct of business rules go above what was required by the PSD and – on some points – violate the PSD's maximum harmonisation approach.

Implementation rules broaden in-scope transactions

The new Belgian rules will cover a set of transactions that are out of scope of the PSD.

- *"One-leg-out" transactions* – The conduct of business rules mandated by the PSD apply only where the payment service provider of both the 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 the EEA.

The Belgian legislator intends to bring one-leg-out payments within the scope of Belgian regulations. The rules on liability for unauthorised payment transactions will be applicable when only the payment service provider of the payer is located in Belgium. Other conduct of business can be made applicable entirely or partially to one-leg-out payments by a government decision.

- *Non-PSD currencies* – The PSD conduct of business rules only apply to payment services made in euro or the currency of a Member State outside the euro area. Here again, the Belgian legislator has taken a broader approach. The rules on liability for unauthorised payment transactions will apply irrespective of the currency to which the payment service relates.

Belgian rules go above and beyond what PSD requires

The PSD takes a maximum harmonisation approach. This means that provisions have to be implemented into national law without deviations (except where the PSD explicitly permits it). The Belgian implementation laws do not always comply with this approach.

The Belgian legislator has tried to stay close to the conduct of business rules provided by pre-PSD regulations. This has resulted in requirements that go beyond and above what is required by the PSD, and in terminology that deviates from the concepts used by the PSD.

- *Narrowing down PSD exemptions* – Many payment-related activities of retailers are carved out from the PSD. Such is the case for example in respect of the issue and redemption of store cards (which can only be used for payments in a specific shop or a chain of stores) and club cards (which can only be used within the club compound). This exemption will be more restrictive in Belgium and additional conditions will need to be complied with for this exemption to apply. The exemption is, for example, conditional upon the absence of credit facilities linked to the instrument. Retailers may need to review how their credit arrangements are structured, to avoid inadvertently falling within the PSD.
- *More information and conditions for the Belgian payment service user* – The PSD provides for a limited list of items of information and conditions that need to be provided to payment service users. The Belgian legislator has added certain bits of information to the PSD list. Payment service providers active in Belgium will, for example, need to provide additional description on the features of a payment instrument, as well as a description of the security risks linked to a payment instrument.
- *Special regime for evidence on authentication of transactions* – A specific set of rules will be created governing evidence on authentication of transactions and how contested transactions should be registered and booked. No such rules exist under the PSD and it is unclear to what extent such rules will apply to non-Belgian payment service providers.

- *PSD terminology replaced by local law concepts* – Absence of liability in case of "abnormal and unforeseeable circumstances beyond the control of the party pleading for the application of such circumstances, the consequences of which would have been unavoidable despite all efforts to the contrary" under the PSD becomes absence of liability in case of "force majeure" under Belgian law. Although the concepts are of course similar, such an approach creates uncertainty about the scope of rights and obligations and hinders a European interpretation of the rules.

Prudential regime in line with PSD

The new prudential regime on payment institutions has been transposed in a more straightforward way. The Belgian prudential regime is almost a copy of the PSD, which will facilitate cross-border business. Some grey areas in the PSD, such as supervision of conduct of business rules, have however been implemented into Belgian law without clarification.

Passporting of EEA Payment Institutions aligned to banking regime

- *Local rules for branch establishment* – EEA payment institutions will need to respect the following Belgium-specific rules when establishing a branch:
 - report periodically for statistical purposes to the National Bank of Belgium on transactions executed by the branch in Belgium;
 - keep its books, establish its annual accounts and publish annual financial information in respect of their transactions in Belgium;
 - appoint an external auditor to assess internal control mechanisms, audit financial statements concerning the branch and assist the CBFA in its supervision tasks.
- *Which conduct of business rules apply for cross-border business?* – As is the case for passporting of banking services, the Belgian situation is unclear as to whether EEA payment service providers will need to comply with the conduct of business rules of their home country, or whether they will need to comply with Belgian conduct of business rules. Future guidance from the regulator may clarify this situation.

Clarity for non-EEA payment service providers

- *Belgian branches of non-EEA credit institutions* – Belgian branches of non-EEA credit institutions are authorised to provide payment services in Belgium without the need to obtain an additional licence as payment institution. The uncertainty created by the European Commission's position in respect of European branches of non-EEA credit institutions has therefore been avoided. This also means that Belgian law is already in line with the recently introduced amendment to the PSD clarifying the regulatory situation of European branches of non-EEA credit institutions.
- *Non-EEA payment institutions* – Non-EEA payment institutions will only be allowed to provide payment services into Belgium through the establishment of a Belgian branch. Government has been given the authority to provide for specific rules on status and supervision of such branches. Until such specific rules have been issued, no Belgian branches of non-EEA payments institutions can be established.

ANNEX: LIST OF MEMBER STATE OPTIONS OF TRANSPOSITION USED BY BELGIUM

PSD Article	Option Details	Exercised?
Article 2(3)	Waiver for institutions under Article 2 of the Capital Requirements Directive	No
PAYMENT SERVICE PROVIDERS		
Article 7(3)	Non application of PSD ongoing capital requirements when a payment institution is included in the consolidated supervision of the parent credit institution	Yes
Article 9(2)	Calculation of safeguarding requirements when funds can be used for future payment transactions and for non-payment services	Yes
Article 9(3)	Application of safeguarding requirements to non hybrid payment institutions	Yes
Article 9(4)	Application of safeguarding requirements only to funds that individually exceed EUR 600	No
Article 22(3)	Option to take into account professional secrecy rules of the Capital Requirements Directive	Yes
Article 26(1)	Waiver of authorisation/supervision requirements for small payment institutions	Yes
Article 26(4)	Limitation of the activities carried out by waived entities under Article 26	Yes
TRANSPARENCY OF CONDITIONS AND INFORMATION REQUIREMENTS		
Article 30(2)	Application of information requirements to micro enterprises in the same way as to consumers	No
Article 33	Burden of proof on the payment service provider for information requirements	Yes
Article 34(2)	Low-value/e-money payments: reduction or doubling of the amounts for national payment transactions and increase of the amounts for prepaid instruments up to EUR 500	Yes
Article 45(6)	More favourable provisions on termination conditions for framework contracts	Yes
Article 47(3)	Provision of information to the payer on paper once a month free of charge	Yes
Article 48(3)	Provision of information to the payee on paper once a month free of charge	Yes
RIGHTS AND OBLIGATIONS		
Article 51(2)	No application of out-of-court procedures to enterprises	Yes
Article 51(3)	Application of Title IV to micro enterprises in the same way as to consumers	No
Article 52(3)	Interdiction or limitation of surcharging practices	Yes
Article 53(2)	Low-value/e-money payments: Reduction or doubling of the amounts under for national payment transactions and increase of the amounts for prepaid instruments up to EUR 500	Yes
Article 53(3)	Option not to apply the liability provisions when the payer's PSP does not have the ability to freeze the payment account or block the payment instrument limited to accounts or instruments of a certain value	Yes
Article 61(3)	Reduction of payer's liability for unauthorised use of payment instrument taking into account the nature of personalised security features of the payment instrument	Yes
Article 72	Shorter maximum execution times for purely national payment transactions	Yes
Article 88(3)	Transitional provision for legal persons that have commenced their activities before 25 December 2007	No
Article 88(4)	Transitional provision for natural or legal persons that would eligible for the waiver under Article 26	Yes

This note focuses on the Belgian implementation of the PSD. For more general information on the PSD we can refer you to our other publications. If you would like to receive copies of other publications listed below, please e-mail: celine.deforge@cliffordchance.com

The PSD and SEPA: Strategic Impact
The PSD and SEPA: Operational Impact
The PSD and SEPA: Customer Impact
Payment Services and the European Labyrinth
Payment Services Directive - top 10 questions

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.

www.cliffordchance.com

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Tokyo ■ Warsaw ■ Washington, D.C.

* Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm