

# Transaction Services Newsletter

## Feature article

### Dodd Frank in the EU – The Payments Angle

#### Introduction

When going through pages and pages of legislative provisions comprising the Dodd Frank Wall Street Reform and Consumer Protection Act, one may not easily spot section 1073, which governs cross-border electronic transfer payments originated by United States consumers. Section 1073 had to be implemented by 7 February 2013. So, what does Section 1073 require, and what is its impact in Europe?

#### What does Section 1073 say?

Section 1073 provides for the regulation of cross-border electronic transfer payments exceeding USD 15 in amount originated by US consumers. It is aimed at enhancing transparency over the terms of international payments for such persons. This is achieved by mandating that US based remittance transfer providers that send more than a *de minimis* amount of transfers abide by certain disclosure requirements. Under Section 1073, any providers that fall within its scope, including money transfer businesses, US depository financial institutions, broker-dealers and US-based subsidiaries of foreign banks, must have knowledge of the exact costs and terms applicable to cross-border consumer initiated payments. The costs and terms may include charges imposed by the tax authorities, payment service providers, intermediaries and payment systems outside the US – i.e. including in Europe.

Section 1073 does not stop at imposing disclosure obligations – it also enables a US consumer to cancel any payment within 30 minutes, obligating the Section 1073 Provider to refund such consumer within 3 business days of a cancellation request for all relevant amounts. In addition, US consumers are afforded up to 180 days to claim in respect of an error relating to the amount or to delayed receipt/non-receipt of the funds.

Payments conducted via wire transfer (including SWIFT), as well as ACH payments, online bill payments and even prepaid card payments are in scope. Furthermore, it does not matter in what currency the payment is denominated.

#### But why should we care in the EU?

At first sight, Section 1073 relates to payments where the originator is a US consumer and is aimed at protecting such individuals – therefore, why should we care in the EU?

One of the key issues with the disclosure requirements of Section 1073 becomes accentuated in the (quite common) situation of a long chain of intermediaries between the payer and the payee. Under Section 1073, where a retail payment occurs cross-border, the retail payer has to be informed of all relevant fees and other costs that will be withheld before the payment in question reaches the payee. However, obtaining

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this information is likely to be complicated in practice, especially when many intermediaries and different states are involved.

To start with the simplest case, the various disclosure obligations imposed on Section 1073 Providers will inevitably translate into them making increased requests for information as to fees, taxes and other matters from intermediaries down the payment chain. Inevitably, these requests will be passed on to non-US institutions, which will have to comply in a timely manner or experience delays in the relevant fund transfers. Currently, fees applied by the beneficiary bank are not visible to the US service provider initiating the cross-border payment in question, and there may be issues under privacy laws or other constraints that prevent foreign institutions from providing the requisite information; the industry will need to consider how to best address these. Moreover, US subsidiaries of EU institutions who are classified as Section 1073 service providers will have to ensure that they comply with all the requirements of this section.

Another reason as to why Section 1073 is relevant to the EU is that, on a closer inspection, its scope is wider than meets the eye - for example, Section 1073 applies to payments for goods imported into the US and to gift certificates or store gift cards, where such cards have been issued to a US consumer in specified or denominated amount, provided that this is for household, family or personal use. This is irrespective of whether the card in question was primarily funded by a business. Accordingly, where a US employee travelling in the EU makes a T&E payment with a prepaid card, Section 1073 would be triggered and the payment would be classed as a payment from the US to a foreign country.

Another important matter that could be significant for EU payment providers is the fact that Section 1073 seems to contradict certain provisions that have been the 'norm' for cross-border transfers in the EU since the Payment Service Directive came into force. One example includes the importance placed on the beneficiary's name, rather than the account number/IBAN (which has been

the norm in the EU). Under Section 1073, Section 1073 Providers will have to pay the beneficiary on the basis of the name provided to them by the US consumer, who will not be liable for providing incorrect account details. This practice contradicts the internationally accepted emphasis on account numbers and IBANs and may complicate matters between providers when for example a payment involves a chain of Section 1073 Providers and EU entities. Another question relates to charging codes: in the EU, only "SHA" is legitimate for a payment within the scope of the PSD, but Section 1073 seems to contemplate that "BEN" is permitted. If the PSD is (as has been widely predicted) extended to cover one-leg- out payments, there could be a conflict between the EU and US approaches.

Care will be needed to ensure that the revised PSD is in line with the Section 1073 provisions as much as possible, especially in areas where the two end up covering the same ground.

## Market Developments

### Securities Services

#### 1. AIFMD: sock, horror

At last the European Commission issued the Level 2 measures to flesh out the AIFMD. Although this happened before the end of 2012, the new legislation takes effect only after publication in the EU's Official Journal, an event which is awaited with enthusiasm. By some people. There is a Clifford Chance commentary on the measures, which prompted the following learned remarks: "It is always exciting to unwrap a Christmas present, even one that is sock-shaped. And after many months of waiting, many will flick through the AIFMD Delegated Regulation in anticipation of helpful text in areas such as delegation and depositary liability. Alas, the sock-shaped present contains socks."

Meanwhile ESMA has been busy preparing interpretative guidance, and some member states have also been putting together transposition plans, given that (rather unusually, these days) AIFMD is a directive.

European Commission announcement:

[http://ec.europa.eu/internal\\_market/investment/docs/20121219-directive/delegated-act\\_en.pdf](http://ec.europa.eu/internal_market/investment/docs/20121219-directive/delegated-act_en.pdf)

Clifford Chance commentary:

<https://onlineservices.cliffordchance.com/online/viewContent.action?key=Ec8teaJ9Vap%2BVoqtkPks7rvRpkSBxhnEdMEY50ix2a%2F%2B11719cEJMnNVtCYvmHTedHzaXGZg8qri%0D%0ApFzZ11%2FVNg%3D%3D&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQMsTKfmNOG80%3D&searchstr=AIFMD>

ESMA initiative:

[http://ec.europa.eu/internal\\_market/investment/docs/20121219-directive/delegated-act\\_en.pdf](http://ec.europa.eu/internal_market/investment/docs/20121219-directive/delegated-act_en.pdf)

#### 2. School Report, part 2

IOSCO issued a "could do better" school report on the state of client money and client asset protection in March 2011. They have been following up, and issued a set of recommendations to regulators in February.

Consultation report:

<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD401.pdf>

## Market Developments

### Clearing

#### 1. High drama

This is as nail-biting as it gets in financial regulation. On 19 December the European Commission approved the Regulatory and Implementing Technical standards, which are intended to provide additional detail on the European Market Infrastructure Regulation (actually the Regulation on OTC derivatives, central counterparties and trade repositories). Then there was a suggestion that the European Parliament would reject some of the measures. Then the blocking resolution was withdrawn, so the standards can go ahead as planned. The world is saved. The standards come into force after publication in the EU's Official Journal, which is now expected to happen in March. There will also, according to the European Parliament, be revised standards and a FAQ in due course.

Links:

RTS on capital requirements for central counterparties:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_rts\\_capital-requirements-central-counterparties\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_rts_capital-requirements-central-counterparties_en.pdf)

RTS on requirements for central counterparties:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_rts\\_requirements-central-counterparties\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_rts_requirements-central-counterparties_en.pdf)

RTS on indirect clearing arrangements, clearing obligation, public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_rts\\_otc\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_rts_otc_en.pdf)

RTS on minimum details of data to be reported to trade repositories:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_rts\\_minimum-details-trade-repositories\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_rts_minimum-details-trade-repositories_en.pdf)

RTS specifying details of application for registration as a trade repository:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_rts\\_details-application-trade-repositories\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_rts_details-application-trade-repositories_en.pdf)

RTS specifying data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_rts\\_data-to-be-published-trade-repositories\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_rts_data-to-be-published-trade-repositories_en.pdf)

ITS on requirements for central counterparties:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_its\\_requirements-central-counterparties\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_its_requirements-central-counterparties_en.pdf)

ITS on minimum details of data to be reported to trade repositories:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_its\\_minimum-details-trade-repositories\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_its_minimum-details-trade-repositories_en.pdf)

ITS specifying details of application for registration as a trade repository:

[http://ec.europa.eu/internal\\_market/financial-markets/docs/derivatives/121219\\_its\\_details-application-trade-repositories\\_en.pdf](http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/121219_its_details-application-trade-repositories_en.pdf)

## 2. Interoperability

ESMA has also been consulting on links between CCPs and the standards which ought to apply to them. Although links facilitate competitive clearing, they can diminish the effectiveness of risk management by either of the linked CCPs, because compromises are needed to enable each CCP to become a member of the other.

Consultation paper and responses:

<http://esma.europa.eu/consultation/Consultation-Guidelines-establishing-consistent-efficient-and-effective-assessments-int#responses>

## 3. Qualifying CCPs

The Basel Committee's regulatory capital principles for exposures to CCPs distinguish between "qualifying" and non-qualifying CCPs. Qualifying CCPs are those which comply with the CPSS-IOSCO Principles for Financial Market Infrastructures. Trouble is, there aren't many CCPs which "qualify" yet, particularly with the delays to implementing EMIR in Europe. However, the Basel Committee has said that during 2013, if a CCP regulator has not yet implemented the CPSS-IOSCO Principles, but has publicly stated that it is working towards implementing these principles, the CCPs that are regulated by the CCP regulator may be treated as QCCPs. The UK FSA has issued such a public statement relating to UK CCPs.

FSA statement:

<http://www.fsa.gov.uk/portal/site/fsa/menuitem.10673aa85f4624c78853e132e11c01ca/?vgnextoid=24445ec45227c310VgnVCM2000004fbc10acRCRD&vgnnextchannel=de5a7a662c93c310VgnVCM2000004fbc10acRCRD&vgnnextfmt=default>

## Market Developments

### Cash management and payments

#### 1. I'll bet there's still more washing-up to do

The EU Commission has published proposals to update the Anti-Money Laundering Directive and the Funds Transfers Regulation and improve the EU's existing legal framework designed to protect the financial system against money laundering and terrorist financing. The proposals comprise:

- a directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing; and
- a regulation on information accompanying transfers of funds to secure 'due traceability' of these transfers.

The proposed directive clarifies and reinforces the rules on customer due diligence and introduces new provisions to deal with politically exposed persons. It goes beyond the FATF requirements by bringing within its scope all persons dealing in goods or providing services for cash payment of EUR 7,500 or more, in light of concerns that the current EUR 15,000 threshold has been exploited by criminals.

The proposed directive also ensures a more comprehensive coverage of the gambling sector and includes an explicit reference to tax crimes.

Links:

Proposed directive:

[http://ec.europa.eu/internal\\_market/company/docs/financial-crime/130205\\_proposal-directive-money-laundering\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/financial-crime/130205_proposal-directive-money-laundering_en.pdf)

Proposed regulation:

[http://ec.europa.eu/internal\\_market/payments/docs/transfers/130205\\_proposal-regulation-information-transfer\\_en.pdf](http://ec.europa.eu/internal_market/payments/docs/transfers/130205_proposal-regulation-information-transfer_en.pdf)

Clifford Chance briefing:

<https://onlineservices.cliffordchance.com/online/viewContent.action?key=Ec8teaJ9Vaq%2Bumqg5bXJ0aOLRB8XoCRLdMEY50ix2a%2F%2B11719cEJMnNvtCYvmHTedHzaXGZg8qps%0D%0AWg%2Fh4myq2Q%3D%3D&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQMsTKfmNOG80%3D&searchstr=Money>

#### 2. SEPA Regulation heats up

As the deadline for compliance with the SEPA Regulation (Regulation (EU) 260/2012) approaches, firms and infrastructures are looking at their structures and systems to see what needs to be done. So are the regulators. A new piece of UK legislation (the Payments in Euro (Credit Transfers and Direct Debits) Regulations 2012) establishes the Financial Services Authority as the competent UK authority under the SEPA Regulation, and gives the FSA information gathering and investigative powers, the power to impose fines and other disciplinary measures, and to impose consumer redress measures.

Regulations:

[http://www.legislation.gov.uk/ukxi/2012/3122/pdfs/ukxi\\_20123122\\_en.pdf](http://www.legislation.gov.uk/ukxi/2012/3122/pdfs/ukxi_20123122_en.pdf)

#### 3. Perverse Conversions

The EPC has issued a paper clarifying certain technical issues relating to the SEPA Credit Transfer and Direct Debit Schemes. The paper explains that conversion of a euro payment in transit is not permitted: only the payer's bank (where the payer's account is not euro-denominated) or the payee's bank (where the payee's account is not euro-denominated) are permitted to carry out currency conversions.

Paper:

[http://www.europeanpaymentscouncil.eu/knowledge\\_bank\\_detail.cfm?documents\\_id=606](http://www.europeanpaymentscouncil.eu/knowledge_bank_detail.cfm?documents_id=606)

#### 4. Snow White 2

It's almost so long ago we can't remember it. But time was when the Payment Services Directive was being prepared, and it was so tortuous that the European Commission's team spawned seven drafts, and these were nicknamed the Seven Dwarfs. Speculation on the identity of Snow White is not permitted. Now it's time for a remake of this classic.

The European Commission's Payment Systems Market Experts' Group met in November 2012 and the minutes of their meeting have been published. In contrast to the uninspiring name of the group, the minutes are jam-packed with interest: the meeting comprised the auditions for PSD2 (geographical and currency scope, negative scope provisions which are currently too vague, new categories of payment service provider, surcharging, refunds, liability and much more besides).

Minutes:

<https://circabc.europa.eu/sd/d/e9ca4d29-5cff-4464-8a80-74857c05398d/minutes.pdf>

#### 5. George Osborne electrifies payments

The UK Chancellor George Osborne has given a speech on banking reform. There is to be a Banking Reform Act, the main purpose of which will be to separate the retail and investment arms of banks, erecting an "electric ring fence" around the retail bank so its essential operations continue even if the whole bank fails. In a less well-publicised part of his speech, Mr. Osborne also announced that the government will open up payment systems in order to ensure that new players in the market can access these systems in a fair and transparent way.

Speech:

[http://www.hm-treasury.gov.uk/speech\\_chx\\_040213.htm](http://www.hm-treasury.gov.uk/speech_chx_040213.htm)

#### 6. SecuRePay

Entering the contest for bad acronyms is the European Central Bank's initiative for standards for protecting internet payments (SECURE RETAIL PAYMENTS). The ECB has now published the final version of its recommendations, and issued a consultation on draft recommendations for payment account access services.

Link:

[http://www.ecb.europa.eu/press/pr/date/2013/html/pr130131\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2013/html/pr130131_1.en.html)

## What's happening out there?

A checklist of the principal European legislative developments affecting Transaction Services businesses

What	Remind me...	Where's it got to	Which businesses
AIFMD	Regulation of non-retail funds and private equity. AIFs must appoint depositaries; imposes new liability standards on depositaries	Level 1 being implemented in Member States by 22 July 2013 Level 2 measures await publication in OJ	Securities services
EMIR	Clearing (and not just of OTC derivatives!)	Level 1 already in force Level 2 measures await publication in OJ (and some still awaited in draft)	Securities services Clearing
SEPA Regulation	Retirement of national payment schemes for euro payments	Already in force, but key retirement date is February 2014	Cash
CSDR	Regulation of CSDs, but also "settlement discipline"	In legislative process	Securities services
Data Protection	Regulation and Directive to strengthen privacy and citizens' rights over stored data	In legislative process	Cash Securities services
AML4 and Payer Info2	Regulation and Directive to implement FATF rules put forward in 2012	In legislative process	Cash
UCITS V	Amendment to retail funds directive as regards depositary functions, remuneration policies and sanctions	In legislative process	Securities services
Securities Law Legislation	Code of laws about securities held in accounts, and more	Expected draft legislation Q2 2013	Securities services
PSD2	Revised and expanded Payment Services Directive, plus a Regulation on some aspects	Expected draft legislation Q2 2013	Cash
Client money and client assets	Overhaul of CASS Sourcebook	Expected consultation Q1 2013	Securities services Cash

**And also worth watching out for:**

- Financial Transaction Taxes legislation
- Shadow banking proposals
- MiFID2 and MiFIR
- Recovery and Resolution Directive
- Resolution of Infrastructures legislation
- Capital Requirements Regulation
- Revision of EU Insolvency Regulation

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