

28 November 2008

RESPONSE TO FSA CONSULTATION PAPER 08/14

IMPLEMENTATION OF THE PAYMENT SERVICES DIRECTIVE – CHANGES TO THE FSA HANDBOOK

The Payments Council

The Payments Council welcomes the opportunity to respond to this consultation on changes to the FSA Handbook in preparation for the implementation of the Payment Services Directive in the UK.

The Payments Council is the organisation that sets strategy for UK payments. It was established in March 2007 to ensure that UK payment systems and services meet the needs of users, payment service providers and the wider economy.

The Payments Council has three core objectives:

- to have a strategic vision for payments and lead the future development of co-operative payment services in the UK;
- to ensure that the payment system is open, accountable and transparent; and
- to ensure the operational efficiency, effectiveness and integrity of payment services in the UK.

More information on the Payments Council and a full list of our members can be found on our website, www.paymentscouncil.org.uk.

Introductory comments

This response to the FSA's consultation on *Implementation of the Payment Services Directive - changes to the FSA Handbook* has been produced with input from our members actively participating in our PSD Working Group. A full list of Payments Council members can be found on our website at www.paymentscouncil.org.uk.

We welcome the opportunity to comment on the issues raised in this Consultation Paper. We support the principles of alignment, consistency and harmonisation between the



different services covered by the Financial Ombudsman Service (FOS), and the overall approach to enforcement mirroring the FSA's general approach to enforcement under FSMA. However, we do not believe that we are seeing maximised consistency in the area of small businesses and micro-enterprises as differing definitions and complainant eligibility still exist in the proposals put forward. This is going to be particularly complicated for PSPs to manage on a practical operational level.

The issue of one-leg transactions being brought within the compulsory jurisdiction of the Financial Ombudsman Service is one of significant interest to us and we are pleased to have this opportunity to voice our thoughts and concerns.

Throughout our work on the PSD, we have purposely chosen not to comment on policy or regulatory issues concerning payment institutions as we feel that those institutions directly affected are better placed than us to comment on these. For this reason, we have only responded to questions and provided comments where we believe they relate to credit institutions.

The Payments Council and its members are represented on the FSA's PSD Stakeholder Liaison Group and the European level industry group, the PSD Implementation Expert Group.

Responses to questions

Chapter 2 – Dispute Resolution

Jurisdiction of the FOS

1. Do you agree that the FSA should amend the compulsory jurisdiction of the FOS to cover payment services as defined in the Payment Services Directive?

We do agree that the compulsory jurisdiction of the FOS should be amended to cover payment services within the PSD's scope. Many activities covered by the PSD are already within the FOS's jurisdiction in any case. It will be easier for consumers and payment service providers alike to have one body dealing with all the complaints relating to payment services.

Eligibility to bring complaints to the FOS

2. Do you agree with the proposals for the FSA to change the definition of an eligible complainant in the compulsory jurisdiction to include 'micro-



enterprises' instead of small businesses and for the FOS to make parallel changes to the CCJ and VJ?

It does make sense to change the existing eligibility rules from the small business definition to that of 'micro-enterprise' for all types of complaints rather than just for those complaints relating to payment services; not doing so would be highly confusing, both for the business and the payment service providers, and we want to ensure as much consistency as possible.

However, the expectations of those businesses no longer eligible to take complaints to the FOS will need to be managed, particularly in light of the comments made in paragraph 2.13. This states that as a transitional arrangement, those small businesses that would otherwise lose their right to take complaints to the FOS, will retain their right to do so in respect of any policy or contract taken out before 1 November 2009. We believe this means that the prior general information will require the inclusion of the different possible scenarios for complainant eligibility, dependent on their status and the date on which the contract was taken out (i.e. if it was before 1 November 2009). This, along with the need for PSPs to manage these different sets of eligibility criteria for pre- and post-PSD implementation, would only serve to confuse small businesses and micro-enterprises, as they would need to assess which criteria they fulfil.

We would welcome guidance on how this transitional arrangement will be managed and what process will be put in place to deal with complaints from small businesses, in order to determine to what extent they are eligible to escalate complaints to the FOS. We would also appreciate clarity on whether a time period is going to be applied to this transitional arrangement.

In the interests of transparency, we would urge the FOS to consider setting out, or at a minimum cross-reference, its detailed rules referred to in the Consultation Paper for determining eligibility of a micro-enterprise (the rules referenced in footnote 12, paragraph 2.14).

The rules outlined in paragraph 2.15 on complainant eligibility appear to be a slightly complicated dual test process that PSPs will need to follow to ensure that they deal with complaints appropriately. Such a process also means that it will not be immediately clear to a micro-enterprise whether it is eligible to make a complaint on certain issues. It is also highly reliant on the micro-enterprise informing the PSP if its status has changed, although we recognise and welcome the fact that the Regulations allow PSPs to make it a requirement that micro-enterprises provide information to prove their status.

This dual test would also add to the confusion in that giving a user the right of complaint based upon its size at the point of complaint, could differ to its treatment under PSD (i.e. a



PSP may have agreed that a business is not classed as a micro-enterprise so is treated accordingly).

We would welcome appropriate streamlining that could be done to standardise the process for dealing with complaints from micro-enterprises.

3. Do you agree that small charities and trusts should be able to make payment services complaints to the FOS in the same way as consumers and micro-enterprises?

We do agree, in so far as the out-of-court redress procedures should follow the Regulations as much as possible in terms of the treatment of different categories of users. It makes sense to keep the systems consistent.

Territorial scope of the compulsory jurisdiction

4. Do you agree that the scope of the FOS should extend to complaints against payment service providers about one-leg transactions and transactions in non-EU currencies?

We understand and agree with the reasoning and consumer protection arguments for one-leg transactions to be brought within the compulsory jurisdiction of the FOS. However, we do not believe that one-leg transactions should be subject to the same criteria in the test of fairness and reasonableness as those that do fall within PSD scope.

We have always argued that these types of transactions were excluded from the scope of the PSD for the very credible reason that an EU Directive cannot seek to regulate activities and entities outside the EU and the EEA. There are also practical and operational reasons for the exclusion; for example, if a transaction originates from outside the EU, information and operational requirements under the PSD cannot be applied by default as the payer's PSP will not be aware of PSD requirements. Only those elements of the Conduct of Business rules that the payee's PSP within the EU has under its control, such as value dating and availability of funds (Article 73), could be applied. For payments to some countries, it may be that the PSP cannot guarantee what the maximum execution time will be or charging information may not be known for the 'leg-out' side of the transaction.

When dealing with complaints that involve a leg outside of the EU and EEA, we would argue that the different regulatory position does need to be considered when looking at what is fair and reasonable. If the Regulations do not cover these types of transactions, then the Regulations should not be viewed as criteria in the test of fairness and reasonableness. This test should explicitly take into account the status of the transaction, i.e. whether it is subject to PSD (regulatory) requirements or is out of scope and would only



be subject to other requirements or best practice. We also do not believe that it is normal practice for the FOS to go further than regulatory boundaries and so we would not expect that it would happen in this regard.

However, we appreciate that HM Treasury has recently consulted on whether to extend the scope of some elements of the PSD to cover one-leg transactions, which will have a direct impact on this issue. We therefore await the Treasury's conclusion with interest.

Complaints-handling procedures within payment service providers

5. Do you agree with the proposals for applying the DISP 1 rules to payment service providers?

We do agree with applying the DISP 1 rules to payment service providers; this will aid a level-playing field in the market. However, we would appreciate clarity around the application of DISP to payment services provided in another Member State (whether through a branch or on a cross-border basis) from a permanent establishment in the UK. DISP 2.6 describes the territorial scope of the jurisdiction but does not clarify this particular scenario.

6. Do you have any comments on the changes to the consumer awareness requirements in DISP 1 that will apply to payment services?

It would be confusing for firms to provide different information to customers, and at a different time, depending on whether they were offering payment services or other financial services. We therefore support the intention to align the requirements as far as possible.

FOS proposals to extend the voluntary jurisdiction

7. Do you agree that the FOS should amend the voluntary jurisdiction to cover payment services as defined in the Payment Services Directive?

We do agree that the FOS should amend the voluntary jurisdiction to cover payment services. However, if the FOS wants to encourage firms to sign up to the voluntary jurisdiction then consistency in redress procedures across the EU and EEA is vital; FOS's membership of FIN-NET will greatly assist with this.

Chapter 3 – Changes to the Decision Procedure & Penalties Manual (DEPP) and the Enforcement Guide



8. Do you have any comments about our proposals for enforcing the Payment Service Regulations 2008?

We believe that the proposals for enforcing the PSR seems a sensible approach and to move away from the current practice would be contrary to the overriding objectives of the PSD. We would, however, appreciate some understanding of what the FSA's intentions are regarding the enforcement of the conduct of business requirements during the immediate period following 1 November 2009.

Chapter 4 – Use of the FSA logo and some consequential changes to the Handbook

9. Do you have any comments on the proposed consequential changes and on our proposed policy for the use of the FSA logo by payment institutions?

We do not have any comments to make on the proposed consequential changes; they appear to be sensible and in line with requirements.