

6 December 2008

RESPONSE TO FSA CONSULTATION PAPER 08/16

QUARTERLY CONSULTATION PAPER (NO.18)

CHAPTER 8: PAYMENT SERVICES PERIMETER GUIDANCE

The Payments Council

The Payments Council welcomes the opportunity to respond to this consultation chapter on payment services perimeter guidance 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 chapter 8 on payment services perimeter guidance of the FSA's Quarterly Consultation 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 as achieving clarity on areas of scope is highly important to our members in assisting with their business planning for the implementation of the PSD.

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.

General observations

Before answering the specific questions, we have several general observations to make on points raised in the consultation chapter.

We note that the perimeter guidance is aimed primarily at businesses unsure of whether they fall within PSD scope and it is therefore dealing with issues of wider relevance. However, whilst we understand the rationale for this we would appreciate, where possible, issues of narrower relevance to also be included. This is extremely important for Payments Council members as some areas of scope remain ambiguous and until clarity is achieved, members are unable to fully plan within business areas for PSD implementation.

The paper also comments that the FSA believes the guidance should reduce the costs for businesses by limiting the need for them to obtain legal advice on the scope. However, unless the guidance also covers the issues of narrower relevance, our members are still going to need to seek legal advice so costs will still be incurred.

Early clarification from the FSA on these issues is fundamental as the scale of work required for changing IT systems should not be underestimated. Therefore, for issues of narrower relevance that we comment on in this response and for which detail in the perimeter guidance is not possible, we would be grateful for thoughts and responses from the FSA on comments that we have made.

We welcome the question and answer format to the guidance as this makes it an easy document to follow; we also note that the final version of the document is subject to the remaining discussions of the transposition process at European level and the text of the Regulations being agreed.



Responses to questions

10. Do you believe it is helpful for us to prepare perimeter guidance in relation to the PSR?

Yes, we are very supportive of such an exercise. We would encourage more detail to be added on some issues and for several new issues to be included (please see our answers to questions 11 and 12). As outlined in comments above, firms need clarity over the scope of the Regulations in order to prepare their businesses and ensure compliance; this clarity is welcomed at the earliest opportunity.

11. Do you have any comments on the draft text of the guidance?

15.2 General

Q.9, p.11 – regular occupation or business activity

We would appreciate further guidance to be added to this answer, as it will be helpful to understand what factors are taken into consideration when determining whether something is regarded as a ‘regular’ occupation or business activity. Recital 6 of the PSD does contain some further detail on this issue and it would be useful for some of that text to be worked into this answer.

15.3 Payment Services

Q.13, p.13 – flexible savings accounts

The answer to this question includes the following wording: *“For the purposes of PERG 15, flexible savings accounts are those where the holder can place and withdraw funds without any additional intervention or agreement of the account provider...”*

We do not believe that this goes as far as HM Treasury went in its response to the December 2007 consultation paper, as it does not recognise that some accounts may exhibit ‘restrictive features’ that would potentially take it out of scope or are not designed for the purpose of making regular transactions.

We are currently in discussion with the FSA and HM Treasury on the criteria to establish what constitutes a “payment account” and we would like to see any mention of how savings accounts fall within scope amended as per the conclusions of that discussion. Please see



our comments on Q&A 14 and under consultation question 12 for our further thoughts on this issue.

Q.14, p.13 – “payment account”

The definition of “payment account” has been one of our key areas of concern during the transposition process. The FSA has taken a helpful approach in the answer to this question by saying that the Regulations only apply to the features of the account used for the purposes of making transactions. However, we believe this response should go into further detail to explain the extent to which an account will be classed as a “payment account”.

Our view has always been that, from a credit institution perspective, the current account was the primary type of account that the definition of “payment account” was seeking to capture. We believe that this was also the view of the European Parliament and Council when they finalised the wording of the text during the negotiation process. Indeed, our understanding is that the word “exclusively” was deleted from the term as otherwise the definition would simply be too narrow and not match the functionality of a current account, which allows actions other than just payment transactions such as the placing of interest on an account (which wouldn’t be allowed under such a narrow definition).

It is key for both users (consumers and businesses) and the industry that the PSD is not deemed to apply to aspects of business that it was not designed and negotiated to cover. The application of the full requirements as set out in Titles III and IV to all accounts would cause a range of negative and unintended consequences and could dramatically reduce the ability of credit institutions to offer a wide range of attractive types of accounts.

Through discussions, correspondence and published public positions on this issue from both the Commission and HM Treasury, the conclusion the industry has drawn is that a principles-based approach to determine whether an account should fall in or out of scope is favoured. We therefore believe that there are three factors that need to be considered when determining the applicability of an account:

- i) the underlying purpose and functionality of an account (e.g. what activities the Terms & Conditions specifically cover);
- ii) restrictive features; and
- iii) limited ability to place and withdraw funds unless there is additional intervention or agreement from the PSP.

As previously mentioned, we are currently in discussions with the FSA and HM Treasury on this issue and subject to the conclusions of those discussions, we would like to see this answer amended to reflect the criteria that will be used to determine whether an account is in scope.

Q.15, p.13 – cash withdrawals



We believe that more detail should be added to explaining services involving cash withdrawal. The text is not currently completely clear that only the cardholder's own PSP is in scope under cash withdrawals; a bank-owned ATM being used by a non-customer to withdraw cash from their account is only acting as an agent and is therefore not a payment service provider in the meaning of the PSD in this instance (rather it will be a technical service provider and thus excluded from the PSD with respect to that activity). It also does not touch on what happens when currency conversion (or DCC – Dynamic Currency Conversion) is offered at a cash machine. We know from clarification from the Commission that Article 49 (or Regulation 51) on currency and currency conversion does not apply to a conversion that takes place at ATMs. However, this is not mentioned anywhere in the perimeter guidance.

Q.16, p.14 – businesses accepting payments

We welcome the clarity on the status of businesses accepting payments (e.g. a restaurant) as being out of scope. However, we would not want the last sentence of the last paragraph to be in any way read as or extending to payments received by a bank as, for example, repayments of a loan. The sentence in question is: *“By contrast, where a bank accepts payment, on behalf of its clients, by any of the methods described above, in our view it will generally be providing a payment service to its clients.”*

Q.18, p.15 – issuing payment instruments

The last paragraph in this response, which clarifies that issuing direct debit mandates simply for the purpose of being paid for the goods or services that a company provides is not considered to be issuing payment instruments, is very helpful.

Q.23, p.17 – bill payment services

We note that issues relating to the status of bill payment firms under the PSD are still the subject of ongoing discussions at European level and we are yet to receive formal clarification of these discussions. However, we would appreciate it if this question were extended (or a supplementary question added in) to cover the provision of over-the-counter bill payment services.

15.5 Negative scope/exclusions

Q.30, p.20 – non-professional cash collection

We welcome the clarity regarding the non-professional cash collection and delivery within the framework of a non-professional or charitable activity as being in negative scope.



Q.31, p.20 – forex services

We welcome the clarity regarding forex services being out of scope.

Q.33, 38 & 39, pp.21, 23 – payments between PSPs

We welcome the clarity given on payments between payment service providers and those made intra-group.

Q.34, p.21 – investment services

We welcome the clarity given on investment services. However, we would appreciate further detail in the answer to be more explicit on the different accounts related to investments (e.g. capital-at-risk products, bank acting as a trustee, derivatives trading margin accounts), particularly in light of the clarification that the Commission has provided in its online Q&A document (question 129). We understand that these would all fall in negative scope but clarity in the perimeter guidance would be very useful.

Q.36 & 37, pp.21-23 – “limited network”

We welcome the detail that has been included in the answers to the questions regarding a “limited network”. It is extremely useful to have it included here, as it is not given in either the Directive or Regulations, and was an area that we were pleased to receive clarification on during the transposition process. We would also encourage the FSA to include any further detail that can be taken from Recital 5 of the E-Money Directive, which explains the concept of “limited network”.

Q.40, p.23 – independent ATM deployers

Like our comments on question 15, this answer would also benefit from specific mention of Dynamic Currency Conversion (Article 49/Regulation51) not applying to such transactions.

15.7 Transitional arrangements

Q.45, p.27 – conduct of business requirements

Whilst we appreciate the answer that conduct of business requirements will apply from 1 November 2009, we would welcome clarity on how the requirements will be monitored and enforced from this date.



12. Do you think there are any issues not covered in the draft of the guidance that it should address?

As mentioned in our general observations, we note that the FSA does not intend to deal with issues of narrower relevance in order to keep the text accessible. However, this is needed for credit institutions that have a wider business remit, around which there remains much uncertainty. Clarity is therefore needed by these firms and also, we believe, by the FSA in terms of what they should be regulating.

We would urge the FSA to consider adding questions and answers on the following issues of scope.

Scope of currencies and one-leg transactions

Whilst we are still clearly waiting for HM Treasury to publish its conclusion on the question of whether PSD scope should be extended to cover one-leg transactions, and that may have a bearing on this comment, we believe that a Q&A should be added looking at the scope of currencies and one-leg transactions caught by the PSD. This is particularly key to Regulation 71 and is not a straightforward issue for those firms unfamiliar with the PSD.

What savings accounts fall in scope

As discussed in detail under the section on “payment account”, we strongly believe that the majority of savings accounts should not be caught by the scope of the PSD.

There is a risk that should all accounts be brought within scope then the choice of savings products available to consumers could drastically reduce. There would be little benefit to providers to offer accounts with preferential terms and conditions when faced with the costs of complying with PSD provisions when they would bring little benefit to the customer. The market choice could become limited to offering fixed-term account types (which would be out of scope) or instant access savings account types, which are much closer to current accounts in their functionality and do not always offer the same incentives to customers to save money.

Subject to our ongoing discussions with the FSA and HM Treasury on this issue, we think it is very important that a specific Q&A is included in the perimeter guidance on what savings accounts would fall in scope. However, our argument is not that a list of ‘types’ should be given (e.g. ISAs or Regular Savings Accounts) but that a non-exhaustive list of restrictive features should be provided which, along with the underlying purpose of an account, will provide a form of criteria for determining whether a savings account should be exempt from PSD scope.



Insurance contracts

We would appreciate an additional Q&A to clarify that a general insurance or long-term insurance contract is not a deposit and that paying money in connection with a contract of insurance is not placing funds on an account.

Loan accounts

A Q&A on loans should also be included to clarify that loan accounts are out of scope as they involve a payer and payee (one of which being the PSP), rather than the provision of payment services. The draw down of funds is not a single payment transaction from the perspective of the loan account, although receipt of the funds into a current account is a payment within scope from the perspective of that current account. We would also appreciate clarification to be added that all non-transactional debt products, including those of greater relevance to micro-enterprises – such as revolving credit facilities – and letters of credit are out of scope, as well as interest rate swaps.

Consumer prepayments

Clarity should be added that such activity of consumer prepayments is out of scope. Where an account is created for the progressive payment before delivery of goods or services, this is out of scope because it amounts to the customer progressively paying a debt owed rather than the placing of funds on an account. It is also carved out from scope as the regular occupation or business activity of the consumer prepayment firm is not the operation of payment accounts.

The Channel Islands and the Isle of Man

We would appreciate a question being added to the perimeter guidance to clarify that the Channel Islands and the Isle of Man are Crown Dependencies of the UK and are not part of the European Union, and are therefore outside the geographical scope of the PSD.

Micro-enterprises

A question should be included on micro-enterprises and the key elements of timing of assessment to determine the status of a company. We would also appreciate clarity on when a company's status should be re-assessed and how the exchange rate and number of employee criteria should be used.

Provided from/located within the Community



The perimeter guidance is currently silent on this key issue of scope covered in Article 2(1). Considering this forms the basis to the geographical scope of the PSD, we would strongly encourage the FSA to include a Q&A on this issue.