

RESPONSE TO THE IMPLEMENTATION OF THE PAYMENT SERVICES DIRECTIVE: A CONSULTATION ON THE DRAFT LEGISLATION

The Payments Council

The Payments Council welcomes the opportunity to respond to this consultation on the draft legislation 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.

The National Payments Plan

Since responding to the consultation in December 2007 on the implementation of the PSD, work on the first National Payments Plan (NPP) for the UK – the Payment Council's first major piece of work since its creation - has progressed well and the actual Plan was published in May 2008. The *National Payments Plan – setting the strategic vision for UK payments* is intended to provide a framework for the development of payments in the UK over the next five to ten years and covers payment areas as diverse as the future of cheques to account number formats and the role of payments in promoting financial inclusion. The NPP also contains a section covering SEPA and cross-border payments.

Progress against the NPP will be reported on an annual basis with a more fundamental review undertaken every three years.



The *National Payments Plan – setting the strategic vision for UK payments* is available on our website.

Framing our response

This response to HM Treasury's third consultation on the Payment Services Directive 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.

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

We very much welcome this third consultation document from HM Treasury concerning the draft Regulations for implementing the PSD in the UK. The consultation document itself provides useful commentary to accompany the draft Regulations and is structured to encourage stakeholder feedback, both on specifically raised provisions and also more general comments.

We note that there are very few differences between the PSD and the Payment Service Regulations (PSR). Generally, the PSR is a direct "copy out" of the PSD, with some limited changes and additions designed to bring the regulatory regime around payment service providers in line with existing regulatory processes under FSMA.

The transposition process undertaken at European level has helped to clarify many questions that we raised in our response to the previous HM Treasury consultation and through our bilateral discussions, and we appreciate the negotiations that HM Treasury has held with the Commission on many of the issues. With this in mind, we believe it is critical that the outcomes of such discussions are reflected in the Regulations and formally and transparently recorded for reference in the run-up to 1 November 2009 and beyond. It would be regrettable if this detail were lost, considering the work that has gone into seeking clarification, and if uncertainty was able to creep back in. Where this detail is not



considered suitable for inclusion in the Regulations, we would ask for it to be included in the FSA's guidance.

Additionally, what we intend to undertake within the Payments Council is to record the confirmed interpretations in our own industry guidelines. This will both assist credit institutions in preparing their businesses for the implementation of the Directive and also in ensuring that they remain compliant going forwards. We will also be encouraging the FSA to include a sufficient level of detail in the Perimeter Guidance manual (PERG) when amending it to reflect the PSD and also in its Approach Document, particularly in the sections concerning the conduct of business requirements.

We appreciate the proportionate approach that has been taken towards the enforcement of the PSR, and the accompanying penalty regime. We will clearly continue to closely engage with the FSA on this aspect of the implementation in the UK, both through its PSD Stakeholder Liaison Group and also in response to its relevant consultations.

Responses to questions and other observations on the draft legislation

Chapter 2 – Scope and definitions

1. Do you agree with the draft regulations proposed for the scope of the Payment Services Directive? Is any further detail required, or are additional definitions needed?

The Payments Council welcomes the consistency in HM Treasury's use of definitions as a more or less, direct read-across from the Directive text; such consistency is necessary to ensure consistent implementation of the Directive across the European Union. Some sensible changes include putting them in alphabetical order, which is clearly a far more logical way to list them in national law, as well as the odd addition or change to a definition in some cases.

However, we would encourage more detail to be added to several of the definitions where extra clarity has been achieved through the transposition process. We appreciate that significant progress has been made on the detail of many definitional issues, both by HM Treasury with the European Commission through the Transposition Working Group and by the European industry through the PSD Implementation Expert Group in its correspondence with the Commission. This clarity is documented elsewhere, such as in HM Treasury's response to the previous consultation and industry papers, but there is a real risk that this detail could be lost if not recorded elsewhere, as outlined under 'general observations' above. Not doing so will result in uncertainty for all concerned, particularly



where clarifications have been given at EU level and are not carried through into UK law or formal guidance.

“Payment account”

A key definition that would benefit from this additional clarity is that of “payment account”. As highlighted in our response to the previous consultation, the issue of what would constitute a “payment account” under the PSD has been of prime concern to the industry as it had always been our understanding that the text of the Directive had been agreed on the basis that the ‘current account’ was the primary type of account that this definition was seeking to capture. Subsequently, we were very concerned to learn that the Commission was then seeking to interpret the provision in such a broad way that it would include any account capable of making or receiving a payment, so potentially all savings accounts.

However, we appreciate the discussions HM Treasury has clearly had with the Commission on this issue and the very helpful clarity that was provided in the response to the December 2007 consultation, that fixed term deposits and similarly restrictive savings accounts should fall outside of scope. We also understand that secured and unsecured personal and corporate loans and loan accounts, including revolving credit facilities that are not transaction accounts, are out of scope. If the position included in the response is the UK’s final position on this issue, we would urge HM Treasury to include some of this detail in the Regulations to ensure that it is clear to all parties what types of accounts are covered by PSD provisions rather than leave the definition unchanged and risk leaving the ambiguity that accompanies it. The focus must be on the underlying purpose of an account and the functionality that it offers; it would be extremely helpful if this were reflected in the definition itself.

We are currently looking at the functionality of such accounts, based on the detail given in HM Treasury’s response, so that the industry has a clearer idea of exactly which account offerings fall within scope and, indeed, what is out of scope. It is our intention to share our thoughts with HM Treasury and the FSA to seek feedback on our approach.

“Durable medium”

Extra detail added to the definition of “durable medium” would also be helpful to make it clear that electronic methods, such as described in Recital 24, are classed as types of “durable medium” as the Commission has clarified this issue.

Our suggestion is: *“durable medium” means any instrument, **including electronic**, which enables the payment service user to store information addressed personally to them in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.*



“Charity”

“Charity” has been added as a new definition, which is useful, particularly the clarification that it refers to a charity with an annual income of less than £1 million, as the term is used to dictate when provisions should or should not apply (in accordance with micro-enterprises). However, this definition would appear to exclude those charities in Scotland and Northern Ireland as the Charities Act 2006(c) defines a charity as an institution that is subject to the jurisdiction of the High Court, which only covers England and Wales. We would question whether this was HM Treasury’s intention to exclude charities in Scotland and Northern Ireland from this provision.

“Payment services”

This defines the scope of “payment services” as when they are provided “as a regular occupation or business activity”. However, neither the Regulations nor the consultation document itself address what test will be applied to establish where a payment service is provided on this basis. We would therefore welcome clarification from HM Treasury on how this will be dealt with; we would expect that such a test would be based on the provisions contained in existing FSMA statutory instruments and related Perimeter Guidance contained in the FSA Handbook (PERG 2.3), but statutory instruments or guidance would need to be developed if this is the intention.

“Micro-enterprise”

We recognise the use of the micro-enterprise derogation is an integral part of the Government’s implementation of this Directive in the UK; a point to highlight regarding this derogation is that it will add additional layers of compliance complexity for PSPs and that as countries will be taking different approaches to this, banks with a pan-EU business proposition will need to offer different terms in different countries.

More detail could usefully be added to this definition to provide further guidance for both companies themselves and PSPs when assessing their status. Recommendation 2003/361/EC(c) as referenced in the definition includes useful guidance on other issues, such as calculating headcount, in addition to those articles already provided. We would therefore suggest the following amendment to the definition:

*“micro-enterprise” means an enterprise which, at the time at which the contract for payment services is entered into, is an enterprise as defined in Article 1 and Article 2(1) and (3) of the Annex to Recommendation 2003/361/EC(c) **and as interpreted in the remainder of the Annex;***



We would also appreciate clarification on the issue of the status of a small company, which fulfils the micro-enterprise criteria in terms of number of employees and turnover, but is part of a large group; would PSPs be expected to treat such companies as “micro-enterprises” under the PSD? If so, we assume that it would be up to the company concerned to inform the PSP of its status in order for the PSP to treat it appropriately.

Definitions that are different in the PSR

We have identified four areas where the Regulations differ from definitions in the Directive and we would appreciate explanation from HM Treasury on why these changes have occurred in order to better understand their potential impact on the industry.

The first is the definition of “branch”, which we presume is to bring it in line with the definition in the Companies Act 2006. This makes the definition narrower than it is in the PSD, as it means that for an entity to be a branch it has to be “legally dependent” on the relevant payment institution; the PSD only stipulates that a branch “has no legal personality”.

The second relates to HM Treasury’s decision to take advantage of the waiver for small payment institutions and how the PSR provides two separate definitions in place of the single “payment institution” definition: “small payment institution” and “authorised payment institution”. This means that only an “authorised payment institution” will need to comply with the prudential requirements and have the ability to passport its permission across other Member States.

Thirdly, there are a number of new definitions to cover the ability for larger payment institutions (i.e. authorised payment institutions) to passport in and out of the UK (e.g. EEA agent, EEA branch, host state competent authority, etc), but we do not believe any of these to be controversial.

Lastly, the definition of “money remittance” has been expanded to indicate that money or monetary value must be involved. It would be beneficial to the industry if confirmation could be given that this change has been made to bring it in line with the wording of the Money Laundering Regulations 2007 in relation to “money transmission”.

Negative scope

On the side of negative scope, we have identified two areas that we believe would benefit from additional detail. The first of these is “*paper cheques of any kind, including travellers’ cheques*” in Schedule 1, Part 2, paragraph 2 (g) (i). It would be very helpful if credit card cheques were also given as an example alongside travellers’ cheques to avoid any confusion as credit card transactions are clearly within scope.



The second area is the term "limited network". The term is used in the list of activities that do not constitute payment services (Schedule 1, Part 2, paragraph 2 (k) (ii)) but an explanation of what constitutes a "limited network" is not provided anywhere. Having had this term clarified by the Commission, it would be extremely beneficial to include that clarification in the Regulations to explain what types of cards are considered part of a "limited network" and therefore classed as outside of scope. Without this clarity it could remain a grey area for many.

Chapter 4 – Access to payment systems

- 8. Do you agree with the draft regulations in relation to Article 28 of the PSD on access to payment systems, including the investigation powers to be assigned to the Office of Fair Trading (OFT) and the associated enforcement provisions?**

We believe that the powers assigned to the OFT for investigation and enforcement look in line with standard provisions of this nature and we are therefore comfortable with what the PSR will introduce.

By way of additional information, the intention is to get the Faster Payments Service SFD designated by November 2009 so it would not fall under Part 8 of the Regulations.

Chapter 5 – Transparency and information requirements

- 9. Do you agree with applying the stated scope of the PSD to the Payment Service Regulations? What do you think would be the likely regulatory impact of extending the scope?**

The Payments Council does agree with applying the stated scope of the PSD and not going further as the Commission is encouraging Member States to do. One-leg in/one-leg out transactions were expressly negotiated out of scope of the final Directive for the very credible reason that an EU Directive cannot seek to regulate activities and entities outside the EU and the EEA. It would also undermine the maximum harmonisation aspect to this Directive for some countries to apply the PSD, either in part or in its entirety, to one-leg transactions and for others to not do so.

First and foremost, there is a lack of clarity over what is actually meant by extending the scope to one-leg transactions, which in itself could cause considerable problems if Member States introduce it in legislation but relating to different scenarios. We perceive there to be two main scenarios of differing scope:



1. The leg out is with the PSP of either the payer or payee outside of the Single Market and the payment is either sent or received outside the Single Market and covers transactions in all EU Member State currencies.
2. Where the payment described in the first scenario is made in a non-EU Member State currency.

The Commission has previously identified a number of articles in Titles III and IV that it feels can be applied to one-leg in/one-leg out transactions as best practice: Articles 30, 32, 33, 35-48, 49(1), 50, 51, 52(1), 54-58, 60, 61, 64-66, 74 and 79-82.

In suggesting these Articles be applied as best practice to one-leg transactions, the Commission has said that the payments industry would only need to ensure compliance on the leg of the payment transaction that is inside the Single Market. However, the rationale behind this proposal is unclear because if, for example, 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/Regulation 75), could be applied.

As the party in the one-leg out side of the transaction is not regulated under the PSD, there is no enforcement mechanism in place to ensure that the charging and provision of information requirements are adhered to. These requirements may also be in contravention of national laws, which in these circumstances would take precedence over an EU Directive. Additionally, payment systems in countries outside the EU will not necessarily be set up to process payments at the same speed as the PSD dictates that they must be. It would therefore be unreasonable to place the onus on PSPs to ensure compliance with PSD provisions where it is not practical to do so. In order to monitor more closely the actions of banks abroad, all banks would need to establish wide correspondent banking relationships, which would increase costs to the detriment of the consumer.

Where PSPs cannot guarantee what the maximum execution times will be, as will be the case for payments to some countries, it might be that the risk of non-compliance with an extended PSD outweighs the benefits of conducting business in that area, which would again be to the detriment of the UK customer.

However, it is important to remember that it is always open to providers to offer more favourable terms to users than those required by the Directive, including to adopt PSD-like practices in respect of out-of-scope transactions where this makes practical and commercial sense. Adopting a modular approach to the "framework contract" (please see answer to question 10 for more detail on this approach) would allow PSPs to offer more favourable terms to users for one-leg transactions where it is possible, as these terms can



be included in the module relating to that particular payment method. Additionally, this was included as an area for future review under the review clause.

Please see our answer to question 11 for further comments on this issue. Appendix A to our response also provides an analysis of Title III and IV provisions that would cause the industry serious concerns were they to be applied to one-leg transactions.

10. Do you agree with the draft regulations to implement the PSD derogation for low value payments from some of the information requirements?

The Payments Council does agree with the draft Regulations. This approach appears to be proportionate to regulating the provisions and in line with the stated aims of the PSD.

Other comments relating to this chapter:

1. Under Regulations 37(5) and 53(4), HM Treasury has included small charities in the derogations afforded to micro-enterprises. We would argue that charities should have a similar duty to inform the PSP of its status and if that status changes, whether it be due to passing the turnover threshold or its charitable status. Therefore, we would propose the following amends to the Regulations:

Regulation 37, paragraph 5

*For the purposes of paragraph (4)(b) **and (4)(c)** the payment service provider may require the payment service user to inform it-*

- (a) at the time at which it enters into the contract for payment services, that it is a micro-enterprise **or charity**; and*
- (b) at any time during the contractual relationship, of any change in status resulting in it no longer being a micro-enterprise **or charity**.*

Regulation 53, paragraph 4

*For the purposes of paragraph (3)(b) **and (3)(c)** a payment service provider may require the payment service user to inform it-*

- (a) at the time at which it enters into the contract for payment services, that it is a micro-enterprise **or charity**; and*
- (b) at any during the contractual relationship, of any change in status resulting in it no longer being a micro-enterprise **or charity**.*

Additionally, the Regulations do not make it clear what happens if the PSU fails to inform its PSP of a change in status; for example, a former corporate falls under the definition of



micro-enterprise. We would appreciate guidance from HM Treasury on what would happen in such a situation.

2. We are pleased to see extra clarity given in the consultation document to the requirement of lighter provisions applying for single payment transactions than for transactions under a “framework contract”. We believe that the Directive text is ambiguous on this aspect and could be read as requiring the same level of disclosure as a “framework contract”. Confirmation that this is not the case under the Regulations is welcomed.

3. Regulation 49 on information for the payee after execution replicates Article 48 of the Directive. Paragraph (2) (a) includes the term “where appropriate” for dictating when a reference to identify the payer and any information transferred with the payment transaction should be made available to the payee. The industry has always maintained that flexibility on the part of the payee’s PSP to decide what constitutes “where appropriate” is essential for ensuring compliance with the Data Protection Act 1998 and protecting the payer from any potential threat of identity theft. It also allows the PSP to take into account the needs of different types of users and the potential practical constraints of certain communication channels. The same issue applies to Regulations 42(2)(a), 43(2)(a), and 48(2)(a).

4. The provisions concerning “framework contracts” have always been of significant interest to the Payments Council, in particular Article 44 relating to changes in the conditions of “framework contracts”. We are therefore very pleased to receive clarification in this consultation paper of the flexibility afforded to new services or favourable changes to a “framework contract”. However, Regulation 45(5), which states that two months’ notice is not required to be given where changes are more favourable to the payment service user, could be read as only concerning changes relating to interest or exchange rates. We therefore strongly urge HM Treasury to amend this Regulation to ensure that the waiver on two months’ notice relates to any change or new service that is favourable to the PSU, as is expressed in the commentary in the actual consultation document. Otherwise we would expect Regulation 45(6) to show that it only refers to Regulation 45(5).

Other than this issue, the draft Regulations seem reasonably flexible overall in their approach to “framework contracts” and we would therefore interpret the following:

- that only those aspects that form part of the “framework contract” would be subject to PSD provisions; and
- that a modular approach to the “framework contract” would be acceptable on the basis that it is not prohibited and would allow for the information to be presented in an accessible manner for customers.

This would allow the “framework contract” to be structured in such a way that the “framework contract” information forms a module, the non-“framework contract” information (i.e. all other Terms & Conditions information) to form another module and the specific



payment type information to be grouped together in additional modules. This way, the PSP would only need to send out to the customer the relevant module document that has either been changed or as a new service is added, which would be in line with moves by the industry to be environmentally-aware and provide information in a more accessible form for customers that avoids 'information overload'.

Certain aspects of a service that are only relevant to regulated contracts, such as credit or overdraft limits, will not be subject to the PSD due to the disapplication of this Regulation in favour of the CCA. We therefore do not perceive an issue with such aspects being changed at short notice (as may be required should a customer show signs of getting into financial difficulty). We very much welcome the approach taken by HM Treasury that consumer credit legislation, where appropriate, will take precedence over these PSD provisions. This is an extremely helpful approach as it solves some troubling issues that the PSD looked to introduce, such as the two month notice period under Article 44 for certain aspects of an agreement.

However, one amendment that we would suggest is to Regulation 45(1)(a) to clarify that the "framework contract" does not necessarily cover every feature of the service agreed between the PSP and the PSU. This would be: *the existing terms **that are covered by these regulations** of the framework contract.*

5. We understand that Article 49/Regulation 51 (currency and currency conversion) will not apply to ATM transactions where Dynamic Currency Conversion (DCC) is offered at the point of withdrawal. This is because the drafting of the article will simply not allow it (there is no 'payee' in such a transaction) and DCC in itself does not constitute a single payment transaction, nor is it offered to the PSU under a "framework contract".

In all cases, there will be a "framework contract" between the cardholder (the PSU) and the card issuer (the PSP) and so the relevant provisions under Titles III and IV will apply to ATM transactions. Unless DCC is offered, the ATM provider is only acting as an agent for the cardholder's own PSP.

For information, we have included a matrix in appendix B that sets out the different scenarios relating to the withdrawal of cash, both through an ATM owned by a customer's own bank and an ATM owned by a different bank. We have included a column on Article 49/Regulation 51 to illustrate how its concept would apply to ATM transactions. However, it is worth noting in any case that LINK Rules on DCC in the UK already require compliance with such information requirements.

6. The Regulations establish that where there are overlapping provisions between the PSR and the CCA, then the PSR provisions will be disappplied in favour of the CCA. We believe



that this is a sensible solution and one that should help to minimise any required change to PSPs' existing terms and conditions.

However, this does raise one potential issue with respect to inconsistencies in the treatment of consumers and micro-enterprises. The CCA provisions will apply to "individuals" as defined under the CCA, namely natural persons, unincorporated associations, and small partnerships comprising three partners or fewer, but not micro-enterprises unless they are also classed as an individual within the meaning of the CCA. The disapplication of certain provisions of the PSD would therefore mean that consumers, or "individuals", will keep to current one month termination periods and notice for change in terms of contract and will also keep to existing dispute periods. However, micro-enterprises would be covered by the equivalent PSD provisions which in turn would mean that they will actually receive more favourable terms than consumers under the CCA.

We welcome further thoughts from HM Treasury and the Department for Business, Enterprise and Regulatory Reform on how this issue will be dealt with.

7. It is unclear as to the implications for a PSP of non-compliance by a payee; for example, the failure to disclose a charge prior to the initiation of a payment transaction (such as in Regulation 52), which is charged to the payer. We would appreciate clarity on this issue.

Chapter 6 – Rights and obligations of providers and users

11. Do you agree with applying the stated scope of the PSD to the Payment Service Regulations, or do you think that the UK should go further and require providers to also comply with some or all of the PSD conduct of business requirements in Title III for one-leg transactions?

Payments Council agrees with applying the stated scope. As outlined in our answer to question 9, we do not believe that an EU Directive can seek to regulate activities and entities outside the EU and the EEA.

The key issue in requiring providers to comply with some or all of the PSD conduct of business requirements in Title III for one-leg transactions is that some information relating to the payment will simply not be known to the PSP with the 'leg-in'. Such information includes the maximum execution times and charges.

We have completed an analysis of Title III - and also Title IV - provisions and highlighted those that would cause serious issues for payment service providers were they to be applied to one-leg transactions. This matrix is included in appendix A to this response.



12. Do you agree with the draft regulations to implement the PSD derogation for low value payments from some of the information requirements?

The Payments Council does agree with the draft Regulations. This approach appears to be proportionate to regulating the provisions.

13. Do you agree with the proposed regulations for implementing the PSD Title IV rights and obligations in relation to authorisation of payment transactions? Is any further detail needed?

We recognise and welcome the work completed by HM Treasury during the transposition process to clarify those important, and at times, unclear provisions included under Title IV. Taking the Regulations in order, we have the following comments to make:

1. Under Regulation 58 on limits on the use of payment instruments, we believe that paragraph (3) should start with the words “*Subject to paragraph (4) of this regulation,..*”. The danger is that without these words, paragraph (3) would be an absolute obligation and paragraph (4) would be redundant.
2. Whilst Regulation 58 provides three reasons to account for the blocking of a payment instrument, we would not see this as precluding a PSP from blocking the use of a payment instrument for other reasons, such as the breach of terms and conditions.
3. Regulation 59 sets out the obligations of the payment service user in relation to payment instruments, which essentially brings personal responsibility into formal legislation. We would be interested in hearing HM Treasury’s views on how this will work in practice; if it is written into the Regulations that the payment service user must take all reasonable steps to keep the personalised security features of the payment instrument safe (Regulation 59 (2)), yet the use of a payment instrument recorded by a provider is in itself not necessarily sufficient to prove the user fraudulent or grossly negligent, what does this actually mean in a real-life scenario?
4. We would argue that the opening sentence of Regulation 61(1) should include Regulations 63 and 79 when stating when a PSU is not entitled to redress.
5. We note that Regulation 61(1) is not included under the list of Regulations under 53(3) open to corporate opt-out. In the Directive text, parties may agree on a time period different from that laid down but this is not reflected in the Regulations.
6. We also note that the wording under the second paragraph of Article 54(2), that “*in the absence of such consent, a payment transaction shall be considered to be unauthorised*”,



has not been transposed across to Regulation 57(2). We believe that this wording is necessary to ensure clarity.

7. Article 60 of the PSD has caused the industry concerns by the use of the word “immediate” in dictating when a PSU should receive a refund of an unauthorised transaction. Current practice is that once notified of an unrecognised transaction, a provider investigates the claim and provides a refund once the transaction is shown to be unauthorised.

We are therefore pleased to see that the wording of Regulation 63 starts with “*Subject to regulations 61 and 62*”, which implies that a period of investigation must be allowed before refunding an unauthorised transaction, by the very fact that it is subject to regulation 62, which concerns evidence of authorisation and execution of payment transactions. However, we do strongly believe that this regulation should be amended to explicitly support the position that a refund should only be given post-investigation, provided that HM Treasury is in agreement with this interpretation and the transposition process allows it, to remove any ambiguity for all parties.

An opposite interpretation, whereby a refund being required upon the customer first notifying their bank of a transaction that they do not recognise, would potentially have serious consequences for the banking industry, particularly as this provision is not open to a corporate opt-out so the transaction amounts being disputed could potentially be of an extremely high value.

There are clear potential impacts that this could have on the level of fraud – in particular first-party fraud. First-party fraud occurs when an account holder falsely claims that transactions are unauthorised so, for example, would spend or withdraw the money, then report the payments as fraudulent and attempt to get a refund from their bank. Such frauds happen on both an opportunistic basis and also by organised gangs who open accounts solely with the intent to commit first-party fraud. By insisting that refunds are made immediately, before an investigation can be conducted, criminals would be even more encouraged to commit this type of fraud. This is because with an immediate refund policy, a first-party fraudster would promptly withdraw all funds from the account and abscond. When the bank detects it has been a victim of a first-party fraud it would have lost out twice to the fraudster – once with the original transaction and secondly with the refund.

The problem is further exacerbated where the unauthorised transaction pertains to a business customer. If an employee is able to initiate a transaction beyond their authority because of poor controls implemented by the business, it would be extremely unreasonable to expect a bank to compensate for its failings. This further emphasises the importance of undertaking an investigation into any potentially fraudulent transaction before issuing refunds.



Additionally, in the UK there has been little evidence to suggest that customer detriment is occurring by innocent victims being refunded with undue delay. The key concern for a victim of fraud is that they do get their money back, rather than how quickly this occurs, and in fact research by Which? has shown that 95% of customers who report transactions as unauthorised get a refund from their bank or building society¹.

Current practice for dealing with unauthorised transactions in the UK is that once a customer notifies their bank or building society of a transaction that they do not recognise, the financial institution would typically take the following steps:

- Take details of the transaction(s) in question and start investigating the circumstances.
- The customer is asked to confirm that the transactions are fraudulent, commonly although not always by way of a signed disclaimer.
- Put an immediate hold on the account if practical (such as a credit card account).
- Provide the customer with a shadow account or shadow overdraft facility if necessary to allow the customer to continue paying for goods and services while the investigation is underway.
- Under The Banking Code, subscribing PSPs are required to treat their customers quickly and sympathetically when things go wrong. Equally, the FSA's Treating Customers Fairly "outcome 6" states that customers must not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.
- Once an investigation has been conducted and shown that the transaction was not authorised, then a refund (and any associated costs incurred by the customer) would be immediate including interest charged by the PSP on the unauthorised transaction amount. These actions place the customer back in the position that they would have been in prior to the fraudulent event.

The length of time for investigation will vary and can depend on how quickly a customer returns the signed disclaimer form, the complexity of the case, and the willingness of the customer to participate in any interviews, for example. In cases where there is clear evidence of fraud the funds could be refunded within a few days: where more investigation is required this could take 20 to 30 days.

6. Regulation 71(3) reads: "Regulation 72(4) applies to all payment transactions executed in the United Kingdom where such payment transactions are carried out in euro or in the currency of an EEA State outside the euro area." We assume that this does not refer to intra-UK payments, but payments that either originate from or are received into the UK (for example, a Swedish Krona payment sent from Stockholm to London).

¹ Which? report, *12 ways to beat bank fraud*, Which? Money magazine, June 2008.



7. We welcome the clarity in Regulation 74 regarding cash placed on a payment account, which clearly states the difference in value dating for consumer/micro-enterprise/charity accounts against corporate accounts. We are pleased to see confirmation that the payment service user is the holder of the account and we would also read this as the entity placing the cash as acting on behalf of the account holder, so the correct value dating provisions will always apply regardless of who actually places the cash. We also assume that “time of receipt” is interpreted in the same way as under Regulation 67.

8. Article 73 on value date and availability of funds (Regulation 75) has caused us concerns because we have always understood that the second sentence in Article 73(1) must be read as following on from, and subject to, the first sentence, particularly in respect of the reference to “business day” in the first sentence. We understand this to be inherent in the meaning of the second sentence as it determines for the customer when the funds will be made available to them.

However, we are concerned that the corresponding Regulation has been changed in structure, which now makes the two sentences into separate paragraphs and therefore removes the relevance of “business day” in the first sentence from the second. What this means in practice is that should the funds reach the payee’s PSP’s account on a local bank holiday, the PSP will be required to ensure that the funds are at the payee’s disposal even though the systems to allow this are not in operation. We strongly urge HM Treasury to consider either including the term “business day” in paragraph (2) or including the two sentences in the same paragraph.

8. Finally, we note the comments in paragraph 6.14 of the consultation document, in which the Government encourages the industry to maintain the current UK industry standards for direct debit payments under the Direct Debit Guarantee. As we are sure HM Treasury is aware, the time limit of the Guarantee is currently under review as part of the National Payments Plan. We will consider the Government’s comments on this and also keep Treasury officials informed of the outcomes of this review.

Chapter 7 – The competent authority

14. Do you agree with the proposed duties and powers assigned to the competent authority for the effective supervision and enforcement of the draft Regulations?

The PSR places duties and powers on the FSA, as the competent authority, in line with the existing provisions that have been developed under FSMA. This seems a sensible approach and to move away from current practices would seem contrary to the overriding objectives of the PSD.



Regulation 84(1) states that the Authority must allow interested parties to submit complaints to it when a payment service provider has breached a provision in the Regulations, which would allow both the FSA and the Financial Ombudsman Service (FOS) to take on complaints made against a credit institution on the basis that the institution has not abided by the Regulations. We would therefore welcome clarity over how complaint handling will be managed under the PSD and what process a customer should follow if they are not happy with the answer from their PSP after making a formal complaint to them.

Chapter 8 – General provisions, transitional provisions and amending other legislation

15. Do you agree with basing the penalty regime on the precedent in Financial Services and Markets Act (FSMA)?

The Payments Council does agree with basing the penalty regime on the precedent in FSMA. This seems a sensible approach and to move away from current practices would seem contrary to the overriding objectives of the PSD.

16. Do you consider that the implementing regulations ought to make provision for the unenforceability of agreements entered into in contravention of the prohibition in regulation 110(1)?

The Payments Council does consider that the implementing regulations ought to make provision for the unenforceability of agreements. This is in line with existing UK process.

17. Do you agree with the proposed implementing regulations in Parts 9 to 11, concerning general provisions, transitional provisions and amendments to other legislation? Are there other pieces of legislation in need of amendment?

The consultation document says that to date, discussions at EU level suggest that transitional provisions will only apply to the authorisation and registration of payment institutions and not to the conduct of business provisions, which would mean that credit institutions would be required to fully comply with all of the PSD from 1 November 2009. The industry is working hard in order to achieve compliance with the PSD by this date, although still anticipating the final clarification on several issues outstanding from the transposition process, and undertaking the required major IT system changes. However, we would appreciate guidance on the FSA's intended approach to enforcement from the effective date.

We do agree with HM Treasury's proposed changes to other pieces of legislation. From our perspective of credit institutions, we do not perceive there being other legislation in need of



amendment, but that is not to say that a payment institution may feel that existing legislation applying to them will not be in need of attention.

Clearly there is a strong overlap between the PSD and consumer credit legislation and until the regulations for implementing the CCD are finalised, it is difficult for the industry to fully comment on the implications.



APPENDIX A

Title III provisions that would cause serious issues for PSPs were they to be applied to one-leg transactions.

Article number/title	Corresponding Regulation	Included in Commission's suggested list?	Issue
A37(b) – Information and conditions	41 (2)(b)	Yes	Requires maximum execution time for the payment service to be provided to the PSU – cannot always be guaranteed for one-leg transactions.
A39(c) – Information for the payee after execution	43 (2)(c)	Yes	Requires charging information to be provided to the payee – will not necessarily be known in one-leg transactions.
A42(2)(e) – Information and conditions	Schedule 5, 2(e)	Yes	Requires maximum execution time for the payment service to be provided to the PSU – cannot always be guaranteed for one-leg transactions. Would obligate PSPs to provide customers with two months' notice of changes to charges or maximum execution times applicable worldwide, which would be impractical, expensive and could potentially lead to customers being deluged with communications.
A44 – Changes in conditions of the framework contract	45	Yes	Would obligate PSPs to provide customers with two months' notice of changes to charges or maximum execution times applicable worldwide, which would be impractical, expensive and could potentially lead to customers being deluged with communications.
A46 – Information before execution of	47	Yes	Requires explicit information on maximum execution time and



individual payment transactions			charges payable (and breakdown of charges where applicable) to be provided to the payer – will not necessarily be known or guaranteed in one-leg transactions.
A48 – Information for the payee on individual payment transactions	49	Yes	Requires information to be provided to the payee that cannot be guaranteed to be available in one-leg transactions.

Title IV provisions that would cause serious issues for PSPs were they to be applied to one-leg transactions

Article number/title	Corresponding Regulation	Included in Commission's suggested list?	Issue
A52(2) – Charges applicable	56(2)	No	When no currency conversion is involved, requires the payee and the payer to pay their charges levied by their respective PSPs – problematic given full amount must travel end-to-end and charges may not be known.
A58 - Notification of unauthorised or incorrectly executed payment transactions	61	Yes	A period of 13 months is given in which a PSU can obtain rectification from his PSP if he notifies his PSP of any unauthorised or incorrectly executed payment transactions – outside the EU the period for which records must be kept can be as short as 6 months, which would mean that if a claim was made after this time, the merchant may no longer be in possession of the necessary records.
A64 – Receipt of payment orders	67	Yes	Cannot guarantee when a payment order shall be deemed to be received in one-leg transactions.
A67(1) – Amounts transferred and	70(1)	No	Requires the full amount of the transaction to be transferred end-to-



amounts received			end – this cannot be enforced in transactions with one-leg out, particularly where a PSP is effecting via an intermediary bank.
A68 – Scope [Execution time and value date]	71	No	Cannot guarantee execution timescale in one-leg transactions.
A69 – Payment transactions to a payment account	72	No	Cannot guarantee execution timescale in one-leg transactions.
A70 – Absence of payee’s payment account with the payment service provider	73	No	Cannot guarantee execution timescale in one-leg transactions.
A71 – Cash placed on an account	74	No	Cannot guarantee execution timescale in one-leg transactions.
A73 – Value date and availability of funds	75	No	Would not be possible if scope was extended to cover all non-EU currencies (contrary to overall scope of Article 2).
A75 – Non-execution or defective execution	77, 78, 79	No	End-to-end liability does not work for one-leg transactions.
A76 – Additional financial compensation	77, 78, 79	No	End-to-end liability does not work for one-leg transactions.
A77 – Right of recourse	80	No	End-to-end liability does not work for one-leg transactions. While liability between EU and non-EU PSPs could be dealt with by contract between them, many non-EU PSPs may refuse to sign up to such liability.
A83 – Out-of-court redress	84	No	Impractical for one-leg transactions.



APPENDIX B

How PSD applies to ATM transactions

	Scenario	What's the relevant information; when in the process provided; provided by which party?	If A49 applied to ATM transactions, would it apply here?
1	Use of own bank ATM to withdraw sterling	Information on transaction will appear on statement (after execution) by the cardholder's PSP.	No – no currency conversion offered.
2	Use of own bank ATM to withdraw euro or other EEA currency using DCC	Currency conversion information will appear on screen (prior to execution) and subsequently on the receipt from the ATM owner (the cardholder's own PSP in this scenario). The customer's statement will detail how much has been withdrawn in sterling (after execution), provided by cardholder's PSP.	Yes.
3	Use of own bank ATM to withdraw euro or other EEA currency not using DCC	All information relating to the currency conversion and withdrawal will appear on statement (after execution), provided by cardholder's PSP.	No – the currency conversion taking place after execution.
4	Use of non-own bank ATM to withdraw sterling	Information on transaction will appear on statement (after execution), provided by cardholder's PSP.	No – no currency conversion offered.
5	Use of non-own bank ATM to withdraw euro or other EEA currency using DCC	Currency conversion information will appear on screen (prior to execution) and subsequently on the receipt, provided by ATM owner. The customer's statement will detail how much has been withdrawn in sterling (after execution), provided	Yes.



		by cardholder's PSP.	
6	Use of non-own bank ATM to withdraw euro or other EEA currency not using DCC	All information relating to the currency conversion and withdrawal will appear on statement (after execution), provided by cardholder's PSP.	No – the currency conversion taking place after execution.