Responsiveness

ARTHUR COX

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Financial Regulatory Group Briefing

Payment Services Directive

Contents

What is the Payment Services Directive?

Directive 2007/64/EC on payment services in the internal market, otherwise known as the Payment Services Directive (the "**PSD**"), was adopted on 13 November 2007 and published in the Official Journal of the EU on 5 December 2007. The deadline for national implementation of the PSD by each of the EU Member States is 1 November 2009. Ireland has implemented the PSD through the European Communities (Payment Services) Regulations 2009 (the "**PSR**") which were signed into law on 29 September 2009. Certain of the provisions of the PSR are currently in effect with the remainder to come into effect on 1 November 2009.

The broad aim of the PSD is to provide the regulatory framework for a single payments market in the EU, so that cashless/electronic payments within the EU can be made as simply, cheaply and securely as domestic payments within a Member State. The PSD will also provide the legislative framework for the Single Euro Payments Area (SEPA) initiative, the aim of which is to enable payments in euros to move freely between users in the EU, wherever they are located.

The PSD aims to generate more competition in the payments market by guaranteeing fair market access and removing barriers to entry. The European Commission's view is that the current fragmented situation, whereby each Member State has its own regulatory framework for payment services, prevents providers from competing properly with each other and offering their services on a pan-European basis, and also acts as an impediment to possible new market entrants such as mobile phone companies or even supermarkets.

The PSD:

- introduces an EU-wide regulatory regime (including an authorisation requirement) for "payment institutions" ("**PIs**") (broadly firms, other than credit institutions or other regulated entities, that provide money transfer or similar services); and
- provides rights for users of payment services and imposes obligations on all payment service providers ("**PSPs**") through new information requirements and conduct of business rules.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

Who does the PSD impact?

Broadly speaking, the PSD applies to PSPs located in the EU who perform any of the payment services set out in the Annex to the PSD. These services include debit and

Earlsfort Centre, Earlsfort Terrace, Dublin 2, Ireland | **tel:** +353 (0)1 618 0000 | **fax:** +353 (0)1 618 0618 | **email:** dublin@arthurcox.com | **web:** www.arthurcox.com

credit card payments, standing orders, money transfers and certain services provided through mobile phones or other digital and IT devices.

The PSD applies to payments made in any EU currency, where each of the payer's PSP and the payee's PSP is located in the EU. The PSD does not, however, apply to all payments. In particular, it does not apply to cheque payments or payments in notes and coins. Payments in non-EU currencies are also out of scope. It is anticipated that sometime in the future the PSD's scope may be expanded to cover payments where either the payer or recipient is outside the EU, as well as non-EU currencies.

The PSD will obviously impact banks and building societies (for whom payment service activities are an integral function), but it will also impact money transfer operators, mobile phone operators and bill payment operators, many of whom may be subject to prudential and/or conduct of business requirements for the first time under the PSD, and who may not currently see themselves as operating in the financial services sector.

The scope of the PSD will have to be studied particularly carefully by firms in the telecoms sector. For example, payments relating to the purchase of digital music or ring-tones that are sent to a mobile phone or other device will not normally be covered by the PSD. However, where a mobile operator makes a payment on behalf of a payment service user to a third party, the payment transaction will fall within the scope of the PSD if the mobile operator is acting solely as an intermediary making the payment.

As noted above, the PSR will be fully in effect in Ireland from 1 November 2009.

What do the PSR require?

Authorisation/registration regime for "payment institutions"

As mentioned above, the PSD introduces a new authorisation regime for PIs. Authorised PIs will be able to "passport" throughout the EU on the basis of the licence obtained in their home Member State. The Financial Regulator is the competent authority for the purpose of granting authorisation to operate as a PI in Ireland. Member States will be required to keep a publicly available register of authorised PIs.

Initial capital requirements for PIs under the PSR will range from €20,000 to €125,000, together with an additional ongoing capital requirement calculated by one of three methods. Under the prudential requirements PIs will have certain reporting requirements in relation to their safeguarding arrangements, agent appointments, level of regulatory capital etc. They will be required to submit annual accounts to the Financial Regulator. The prudential requirements will also include systems and controls requirements, covering issues such as risk management, internal control mechanisms and management knowledge and experience. Each Director and Senior Manager will have to complete an Individual Questionnaire as the Financial Regulator will apply the "Fit and Proper" test to every Director/ Senior Manager to ensure he is of integrity and is competent.

The PSR replaces the majority of the authorization requirements and prudential requirements with a registration regime for, broadly speaking, those PIs that execute less than €3 million worth of payment transactions per month (i.e. relatively low-volume payment processors) and whose management have no convictions for financial crime. Registered PIs, as opposed to authorised PIs, will not be able to passport their services into other EU Member States.

The Financial Regulator has published an application pack of documents for potential applicants for authorisation as a PI including relevant application forms and a draft guidance note which are now available at: http://www.financialregulator.ie/industry-sectors/payment-institutions/Pages/default.aspx.

Institutions intending to supply payment services in Ireland will need to be regulated by the Financial Regulator from 1 November 2009. Transitional provisions will apply to certain institutions, for example, where an institution commenced payment services activities before 25 December 2007. They may continue those activities without authorisation, however they will not be permitted to passport their activities until such time as they are authorised.

Conduct of business requirements for all PSPs

All PSPs, including credit institutions, authorised PIs, registered PIs and others, will need to meet new, harmonised conduct of business requirements, which will include information disclosure prior to and accompanying a payment transaction, as well as certain refund rights.

A number of information requirements are imposed on PSPs by the PSD. The requirements cover content and communication of the main terms of any transaction, including fees, charges and currency exchange rates. The aim is to create increased transparency so that consumers are better able to compare the costs of different payment transactions and different PSPs.

The refund provisions of the PSD include a right of refund for a payment service user of amounts in dispute if the relevant payment authorisation did not specify the exact amount of the payment and the amount executed exceeds the amount that a reasonable payer would expect. This refund right applies even if the transaction was duly authorized and applies, for example, to direct debits. Where payments are unauthorised, the PSD places the burden on the PSP to show that the transaction was authenticated properly where the authorisation is disputed - this has understandably been a controversial provision. The PSD also imposes liability on a PSP in the case of non-execution or defective execution of a payment transaction.

Under the PSR:

- the information requirements of Title III of the PSD and Part 4 of the PSR will apply to consumers and micro-enterprises, however corporate customers can agree with a PI that these requirements will not apply to them; and
- all of the protections for customers provided under Title IV of the PSD and Part 5 of the PSR will apply to consumers, however corporate consumers and micro-enterprises can agree with a PI that these certain of these protections will not apply to them.

Under the PSR, all euro and European domestic electronic currency payments currently have to be completed within one business day, but parties can agree to extend this up to three business days after the payment order has been received by the relevant PSP. From 1 January 2012, payments will have to be completed within one business day after the payment instruction is has been received by the PSP. This requirement has given rise to a degree of controversy - not least because the requirement applies to cross-currency payments whereas the standard FX transaction settlement is currently T+2.

Contacts

If you would like to discuss the legal and strategic implications of the PSD for your institution, please contact:

Orla O'Connor Partner
+353 (0)1 618 0521
orla.oconnor@arthurcox.com

Robert Cain Senior Associate
+353 (0)1 618 1146
robert.cain@arthurcox.com

or any of your usual Arthur Cox contacts.