

EXPLANATORY MEMORANDUM TO
THE PAYMENT SERVICES (AMENDMENT) REGULATIONS 2009

2009 No. 2475

1. This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend the Payment Services Regulations 2009 (S.I. 2009/209) (“PSRs”) for the purpose of making provision for the application of the PSRs to the establishment in the UK of branches of Gibraltar-based firms and the establishment in Gibraltar of branches of UK firms. They also make other minor amendments to the PSRs.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The PSRs implement the EU Payment Services Directive (2007/64/EC) (OJ No L 319, 5.12.07, p.1) of the European Parliament and of the Council on payment services in the internal market, in the UK. These Regulations make minor amendments to the PSRs.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

• *What is being done and why*

7.1 The amendments made by these Regulations include provisions to:

- enable Gibraltar non-bank firms to provide payments services in the UK corresponding to the passport rights of firms authorised in other EEA States under the Payment Services Directive;

- provide for equivalence of treatment for UK firms seeking to establish branches or provide services in Gibraltar with those exercising their passport rights in other EEA States;
- enable the FSA and the Financial Ombudsman Scheme Operator to extend their rules applicable to EEA authorised payment institutions to Gibraltar-based firms, in consequence of the above, without undertaking a further consultation;
- take account of an EC approved corrigendum to the PSD; and
- provide greater clarity for the application of certain regulations.

8. Consultation outcome

8.1 The Government undertook a three-stage consultation process in respect of the implementation of the Payment Services Directive:

- in July 2006, the Government consulted on the European Commission's proposal for a Directive. The consultation responses informed the Government's approach to the European-level negotiations;
- in December 2007, the Government published a consultation on its policy approach towards implementing the Directive; and
- in July 2008, the Government consulted on draft implementing Regulations.

8.2 About 40 responses were received for each consultation. The summaries of the responses to all of the consultations have been published on the Treasury's website (hm-treasury.gov.uk). The Government has had continued engagement with stakeholders on the Regulations and it was not considered necessary to undertake a separate consultation on the amendments made by these Regulations.

9. Guidance on the Payment Services Regulations 2009

9.1 In early 2009, the FSA, as the regulator for most aspects of the Directive, published two documents (the Perimeter Guidance and the Approach Document) detailing the scope of the PSRs and the supervisory and enforcement approach of the regulators. The OFT contributed to these documents with respect to rules on fair and open access to those payment systems within scope of the PSRs.

10. Impact

10.1 A final Impact Assessment was published with the Payment Services Regulations 2009 in February 2009 (http://www.hm-treasury.gov.uk/d/impact_assessment120209.pdf). These Regulations do not have significant additional impacts to those set out in that Impact Assessment. No separate Impact Assessment has been prepared for this instrument.

11. Regulating small business

11.1 The PSRs apply to small business.

12. Monitoring & review

12.1 The European Commission is expected to undertake a review of the implementation and impact of the Directive no later than three years after the implementation deadline of 1 November 2009.

13. Contact

13.1 Phelan Hill at HM Treasury (Tel: 020 7270 6105 or email: Phelan.Hill@hm-treasury.x.gsi.gov.uk) can answer any queries regarding the instrument.

**Transposition note for Directive 2005/60/EC:
Payment Services Regulations 2009**

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
1	Sets out the subject matter of the Directive and the categories of payment service providers (i.e. permitted to provide payment services).	Regulations 110 and 111 and the definition of “payment service provider” in regulation 2(1)	HM Treasury
2.1	Sets out the scope of the Directive: it applies only to payment services provided within the Community and, with certain exceptions, Titles 3 and 4 of the Directive apply only where the payer’s payment service provider and the payee’s payment service provider are, or the sole payment service provider is located in the Community.	Regulations 33(1) and 51(1), (2)	HM Treasury
2.2	Provides that Titles 3 and 4 of the Directive only apply to payment services made in euro or the currency of a Member State outside the euro area.	Regulations 33(1) and 51(1)	HM Treasury
2.3	Enables Member States to disapply the provisions of the Directive to certain bodies.	Regulation 3	HM Treasury
3	Sets out the negative scope of the Directive (i.e the activities excluded from the Directive’s scope).	Regulation 2(1) and Part 2 of Schedule 1	HM Treasury
4	Sets out the definitions of terms used in the Directive.	Regulation 2	HM Treasury
5	Sets out the requirements for applications for authorisation as a payment institution.	Regulation 5(1) and Schedule 2	HM Treasury
6	Provides that Member States must require payment institutions to have	Regulation 6(3) and Part 1 of Schedule 3	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	a minimum amount of initial capital.		
7	Provides that Member States must require payment institutions to have a minimum amount of own funds.	Regulation 18 and Part 2 of Schedule 3	HM Treasury
8	Provides for the permissible methods for calculating own funds.	Regulation 18 and Part 2 of Schedule 3	HM Treasury
9	Sets out the requirements that payment institutions must meet in relation to the safeguarding of funds received from payment service users.	Regulation 19	HM Treasury
10	Sets out the conditions that payment institutions must meet in order to be authorised.	Regulation 6	HM Treasury
10.5	Provides that the competent authorities may require the establishment of a separate entity where a payment institution provides non-payment services as well as payment services.	Regulation 7(4)	HM Treasury
11	Provides that the competent authorities must communicate their decision to an application within 3 months of receipt of the application.	Regulation 9	HM Treasury
12	Sets out the circumstances in which competent authorities can withdraw authorisation granted to a payment institution.	Regulation 10	HM Treasury
13	Requires Member States to establish a public register of authorised payment institutions and their agents and branches, and of persons benefiting from the waiver under Article 26 and the institutions referred to in Article 2(3).	Regulation 4	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
14	Provides that, where any change affects the accuracy of information provided under Article 5, the payment institution must inform the competent authority accordingly.	Regulation 16	HM Treasury
15	Provides for the application of certain accounting and audit directives to payment institutions.	Regulation 20; Parts 15 and 16 of the Companies Act 2006	HM Treasury
16.1	Sets out the activities which payment institutions are entitled to engage in.	Regulation 27(1)	HM Treasury
16.2	Provides that payment institutions may only hold payment accounts used exclusively for payment transactions. Also provides that funds received for the purposes of the provision of payment services do not constitute a “deposit” or “electronic money”.	Regulation 28 and amendments to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 in paragraph 4 of Schedule 6.	
16.3	Places certain restrictions on the granting of credit relating to payment services.	Regulation 27(2)	HM Treasury
16.4	Prohibits payment institutions from conducting the business of deposit—taking.	Implemented through the Financial Services and Markets Act 2000: an institution must be an authorised person under FSMA in order to take deposits.	HM Treasury
16.5	Provides that the Directive is without prejudice to EU consumer credit legislation and to domestic consumer credit legislation not harmonised by the Directive.	Regulations 34 and 52	HM Treasury
17.1 to 17.6	Sets out the regime for the use and registration of	Regulation 29	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	agents providing payment services on behalf of payment institutions.		
17.7	Provides that payment institutions must notify the competent authority before outsourcing operational functions.	Regulation 21	HM Treasury
17.8	Provides that payment institutions must ensure that agents or branches acting on their behalf inform payment service users of this fact.	Regulation 29(14)	HM Treasury
18.1	Requires Member States to ensure that where payment institutions rely on third parties for the performance of operational functions, those payment institutions take reasonable steps to ensure that the requirements of the Directive are met.	Regulation 31(1)	HM Treasury
18.2	Requires Member States to provide that payment institutions remain fully liable for any acts of their employees or any agent, branch or entity to which activities are outsourced.	Regulation 31(1)	HM Treasury
19	Provides that Member States must require payment institutions to keep certain records.	Regulation 22(1)	HM Treasury
20	Sets out the requirements in relation to competent authorities for Title 2 of the Directive, including their designation, independence and powers.	Part 7	HM Treasury
21	Sets out requirements in relation to supervision by the competent authorities.	Regulations 7, 10, 11, 25, Part 7 and regulations 98 to 105	HM Treasury
22	Requires Member States to ensure that the obligation of	The Financial Services and	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	professional secrecy is respected and enforced.	Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, as modified by paragraph 10 of Schedule 5; regulation 107.	
23	Provides that Member States must ensure that decisions taken by competent authorities are contestable in the courts.	Regulation 95, Paragraph 1 of Schedule 5, 106	HM Treasury
24	Requires co-operation and exchange of information between competent authorities.	Regulation 119	HM Treasury
25	Sets out the procedure under which payment institutions can exercise their right of establishment and freedom to provide services.	Regulations 23 to 26	HM Treasury
26.1 to 26.3	Provides for a waiver from the authorisation requirements of the Directive for "small" institutions.	Regulations 13 to 18	HM Treasury
26.4	Enables Member States to provide that persons registered under the waiver provisions may engage only in certain of the activities listed in Article 16.	The UK has decided not to exercise this derogation	HM Treasury
26.5	Provides that waived firms must notify the competent authority of any change in their situation relevant to the fulfilment of the waiver conditions.	Regulation 15	HM Treasury
26.6	Provides that the waiver cannot be applied in respect of provisions of the Third Money Laundering Directive.	The Money Laundering Regulations 2007	HM Treasury
27	Provides that Member	Not transposed	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	States must notify the Commission where they exercise the waived set out in Article 26 and must inform the Commission of the number of persons concerned and on an annual basis of the total amount of payment transactions executed in the year.	into legislation.	
28	Provides that Member States must ensure that rules on access to payment systems are objective, non-discriminatory and proportionate. Provides for certain exceptions from the general provision.	Regulations 96 and 97	HM Treasury
29	Requires Member States to prohibit persons who are not payment service providers or explicitly excluded from the scope of the Directive from providing payment services.	Regulations 110 and 111 and the definition of “payment service provider” in regulation 2(1)	HM Treasury
30.1	Sets out the scope of Title 3 of the Directive and provides that where the payment service user is not a consumer, the parties may agree that any or all of the provisions of Title 3 do not apply.	Regulation 33(1) and (4)	HM Treasury
30.2	Enables Member States to apply the provisions of Title 3 to micro-enterprises in the same way as they apply to consumers.	Regulation 33(4)	HM Treasury
30.3	Provides that the Directive is without prejudice to EU consumer credit legislation and to domestic consumer credit legislation not harmonised by the Directive.	Regulation 34	HM Treasury
31	Provides that the provisions	Paragraph 5 of	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	of the Directive are without prejudice to other provisions of Community legislation requiring prior information; and disapplies certain provisions of the Distance Marketing Directive (2002/65/EC).	Schedule 6	
32	Makes provision in relation to the charges that can be applied by payment service providers for information provided by them.	Regulation 48	HM Treasury
33	Provides that Member States may stipulate that the burden of proof lies with the payment service provider to prove compliance with Title 3.	Not implemented.	
34	Enables Member States to derogate from certain of the provisions of Title 3 of the Directive in respect of low-value payment instruments and electronic money.	Regulation 35	HM Treasury
35	Provides for the application of certain provisions to single payment transactions and provides that where information has already been provided under a framework contract, there is no need to provide it again.	Regulations 33(2) and 35	HM Treasury
36	Requires payment service providers to provide certain information to the payment service user prior to the conclusion of a single payment service contract.	Regulation 36(1)	HM Treasury
37	Sets out the information that must be provided under Article 36.	Regulation 36(2)	HM Treasury
38	Requires payment service providers to provide certain information to the payment service user after the receipt of the payment	Regulation 37	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	order.		
39	Requires payment service providers to provide certain information to the payment service user after the execution of the payment transaction.	Regulation 38	HM Treasury
40	Provides for the application of certain provisions to framework contracts.	Regulation 33(3)	HM Treasury
41	Requires payment service providers to provide certain information to the payment service user prior to the conclusion of a framework contract.	Regulation 40	HM Treasury
42	Sets out the information to be provided by the payment service provider.	Schedule 4	HM Treasury
43	Provides that payment service users are entitled to receive the terms of the framework contract and the information specified in Article 42 at any time during the contractual relationship.	Regulation 41	HM Treasury
44	Sets out certain requirements in relation to the changing of any conditions of a framework contract.	Regulation 42	HM Treasury
45	Sets out certain requirements in relation to the termination of a framework contract.	Regulation 43	HM Treasury
46	Provides that certain information must be provided to the payment service user prior to the execution of an individual payment transaction under a framework contract.	Regulation 44	HM Treasury
47	Sets out certain information to be provided to the payer on an individual payment transaction under a framework contract.	Regulation 45	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
48	Sets out certain information to be provided to the payee on an individual payment transaction under a framework contract.	Regulation 46	HM Treasury
49	Sets out certain requirements in relation to currency and currency conversion.	Regulation 49	HM Treasury
50	Provides for the provision of information on additional charges or reductions.	Regulation 50	HM Treasury
51.1	Provides that where the payment service user is not a consumer, the parties may agree that certain provisions of Title 4 of the Directive do not apply.	Regulation 51(3)	HM Treasury
51.2	Enables Member States to disapply Article 83 where the payer service user is not a consumer.	To be transposed by rules made by the Financial Services Authority (FSA)	FSA
51.3	Enables Member States to apply the provisions of Title 3 to micro-enterprises in the same way as they apply to consumers.	Regulation 51(3)	HM Treasury
51.4	Provides that the Directive is without prejudice to EU consumer credit legislation and to domestic consumer credit legislation not harmonised by the Directive.	Regulation 52	HM Treasury
52	Makes provision in relation to the charges which may be applied by payment service providers.	Regulation 54	HM Treasury
53	Enables Member States to derogate from certain of the provisions of Title 4 of the Directive in respect of low-value payment instruments and electronic money.	Regulation 53	HM Treasury
54	Sets out certain requirements in relation to	Regulation 55	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	consent to payment transactions, in particular, sets out the situations in which consent is given and withdrawn.		
55	Makes provision in relation to any limits on the use of a payment instrument.	Regulation 56	HM Treasury
56	Sets out the obligations of the payment service user in relation to payment instruments.	Regulation 57	HM Treasury
57	Sets out the obligations of the payment service provider in relation to payment instruments.	Regulation 58	HM Treasury
58	Provides for the notification of unauthorised or incorrectly executed payment transactions.	Regulation 59	HM Treasury
59	Sets out requirements for the evidence on authentication and execution of payment transactions.	Regulation 60	HM Treasury
60	Provides for the liability of the payment service provider for unauthorised payment transactions.	Regulation 61	HM Treasury
61	Provides for the liability of the payer for unauthorised payment transactions.	Regulation 62	HM Treasury
62	Sets out the requirements for and circumstances in which the payer is entitled to a refund from the payment service provider.	Regulation 63	HM Treasury
63	Provides for circumstances in which the payer is to be able to request a refund of an authorised payment transaction.	Regulation 64	HM Treasury
64	Sets out the point at which a payment order will be considered to have been received.	Regulation 65	HM Treasury
65	Provides for the	Regulation 66	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	circumstances in which a payment order is refused.		
66	Sets out the circumstances in which a payment order may be revoked.	Regulation 67	HM Treasury
67	Sets out the circumstances in which charges may be deducted from amounts transferred and amounts received.	Regulation 68	HM Treasury
68	Sets out the scope of the provisions dealing with execution time and value dating.	Regulation 69	HM Treasury
69	Sets out the time limits for the crediting of payment transactions to the payee's payment service provider's account by the payer's payment service provider.	Regulation 70	HM Treasury
70	Provides for situations in which the payee does not have a payment account.	Regulation 71	HM Treasury
71	Sets out the requirements to be met in relation to making available and value dating funds where cash is placed on a payment account.	Regulation 72	HM Treasury
72	Provides that Member States may provide for shorter execution times than those set out in the Directive for national payment transactions.	Not implemented.	
73	Sets out certain requirements in relation to value dating and making funds available.	Regulation 73	HM Treasury
74	Provides for circumstances in which an incorrect unique identifier has been used.	Regulation 74	HM Treasury
75.1	Sets out liability where a payment order is initiated by the payer.	Regulation 75	HM Treasury
75.2	Sets out liability where a payment order is initiated by the payee.	Regulation 76	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
75.3	Provides that payment service providers will be liable to their respective payment service users for any charges and interest for which they are responsible.	Regulation 77	HM Treasury
76	Provides that any financial compensation additional to that provided under the Directive may be determined in accordance with the law applicable to the contract.	Provided for in general contract law.	
77.1	Provides for a right of recourse for payment service providers to other payment service providers or intermediaries.	Regulation 78	HM Treasury
77.2	Provides that further financial compensation may be determined in accordance with agreements between payment service providers and intermediaries and the law applicable to the contract.	Provided for in general contract law	
78	Provides that there is no liability in cases of force majeure and where a payment service provider has obligations under other Community law.	Regulation 79	HM Treasury
79	Provides that personal data may be processed by payment service providers in accordance with Directive 95/46/EC in order to prevent payment fraud.	The Data Protection Act 1998	
80.1	Provides that there must be procedures in place to allow payment service users and other interested parties to make complaints to competent authorities.	Regulation 91(1)	HM Treasury FSA
80.2	Provides that where appropriate, the reply from	Regulation 91(2)	HM Treasury FSA

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	the competent authorities must inform the complainant of the availability of out-of-court redress mechanisms.		
81	Provides that Member States must lay down rules on penalties for infringements.	Regulations 84, 85 and 105	HM Treasury
82.1	Provides that complaints procedures and penalties must be administered by competent authorities.	Regulations 80 to 84, 88 and 95	HM Treasury
82.2	Provides that where the provisions of Titles 3 and 4 are infringed the competent authorities responsible for enforcement are those of the home Member State of the payment service provider, other than for agents and branches conducted under the rights of establishment where the competent authority is the host Member State.	Regulations 33(1) and 51(1)	HM Treasury
83.1	Provides that Member States must ensure that out-of-court redress mechanisms are in place.	Regulation 91; paragraph 1 of Schedule 6 and rules made by the FSA	HM Treasury FSA
83.2	Provides that in the case of cross-border disputes, bodies co-operate in resolving them.	Section 410 Financial Services and Markets Act 2000. Not otherwise transposed into legislation. Established practice.	FSA
84	Provides for the adoption by the Commission of implementing measures.	Not transposed into legislation.	
85	Provides that the Commission may be assisted by a Payments Committee	Not transposed into legislation.	

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
86	<p>Provides that, subject to the derogations, the Directive contains fully harmonised provisions; and that Member States must inform the Commission of the exercise of any of the derogations.</p> <p>Also provides that Member States must ensure that payment service providers do not derogate to the detriment of payment service users from the provisions of national law but that payment service providers may decide to grant more favourable conditions to payment service users.</p>	<p>Not transposed into legislation.</p> <p>The Regulations implement these requirements generally</p>	<p>HM Treasury</p> <p>FSA</p>
87	Provides for the review of the Directive by the Commission by no later than November 2012.	Not transposed into legislation.	
88	Makes transitional provision.	Regulations 122 to 125	HM Treasury
89	Makes amendments to Directive 97/7/EC	Regulation 126 and paragraph 3 of Schedule 6 .	HM Treasury
90	Makes amendments to Directive 2002/65/EC.	Regulation 126 and paragraph 5 of Schedule 6	HM Treasury
91	Makes amendments to Directive 2005/60/EC.	Regulation 126 and paragraph 6 of Schedule 6	HM Treasury
92	Makes amendments to Directive 2006/48/EC.	Regulation 126 and paragraph 6(i) of Schedule 6	HM Treasury
93	Repeals Directive 97/5/EC.	Regulation 126 and paragraph 2 of Schedule 6	HM Treasury
94	Provides that Member States must implement the Directive by 1 November 2009 and must communicate to the	Not transposed into legislation.	HM Treasury

Articles of Directive 2007/64/EC	Objective	Implementation	Body Responsible
	Commission the main provisions of national law which implement the Directive.		
95	Provides for the entry into force of the Directive.	Not transposed into legislation.	
96	Provides that the Directive is addressed to the Member States.	Not transposed into legislation.	