

DIRECTIVE ON PAYMENT SERVICES

Public Consultation

June 2016



An Roinn Airgeadais
Department of Finance

Public Consultation Paper:

Payment Services Directive

Department of Finance

June 2016

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1. Introduction

There is a requirement to transpose by 13 January 2018 Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 (known as the revised Payment Services Directive or PSD2).

The Directive was published in the Official Journal of the European Union L 337, dated 23.12.2015 and can be found alongside this consultation document on the Department of Finance website.

The purpose of this consultation is to obtain submissions on the transposition of Directive 2015/2366/EU. The consultation will inform the Department's position with regard to provisions in PSD2 where Member States have discretion as to whether to apply them in national legislation.

The Department invites comments on whether discretions should be availed of, how they should be availed of, and the reasoning for such a position.

The transposition may impact on certain other national legislation and codes. Comments on such impacts are welcome.

In responding to this consultation you are invited to:

- Give your views on the specific questions set out below. You do not have to answer every question – you may choose to answer all of the questions or only those which are relevant to you.
- Provide details of any issues or concerns you feel should be considered in dealing with the particular topic being addressed in your response.
- Where appropriate, provide some analysis of or views on the regulatory and/or financial impact of the proposed approach.

Your views are important as they will help to formulate how best to transpose PSD2 into Irish law and will also help us by identifying areas requiring further consideration.

2. The Consultation Process

The consultation period will run until 5pm on Thursday 15 September 2016. Any submissions received after this date may not be considered. Questions and observations are welcome on any aspect of the Directive's transposition, and not just the issues identified in this consultation paper.

The preferred means of response is by email to: PSD2consultation@finance.gov.ie.

Alternatively, your response may be posted to:

Payment Services Directive 2 Consultation
Banking Services Division
Department of Finance
Upper Merrion Street
Dublin 2
Ireland

Please include your contact details if responding by post.

Freedom of Information

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. Parties should also note that it is the intention that responses to the consultation will be published on the Department's website www.finance.gov.ie after the deadline for receiving the submissions has passed.

It is important to be aware that unless you clearly identify any commercially or personally sensitive information in your submission, you are making a submission on the basis that you consent to it being made available in full on the Department of Finance website.

What happens after this Consultation?

The submissions to this public consultation will be published on the Department of Finance website in due course.

3. What is PSD2?

The following are the main elements of Directive (EU) 2015/2366, referred to as the Payment Services Directive (PSD2):

- Opening the EU payment market for companies offering consumer or business-oriented payment services based on access to payment accounts – the so called "payment initiation services providers" and "account information services providers, thereby ensuring a level playing field exists for both existing and new players;
- Enhancing consumers' rights in numerous areas, including reducing the liability for unauthorised payments, codifying an unconditional ("no questions asked") refund right for direct debits in euro; and
- Introducing strict security requirements for the initiation and processing of electronic payments and the protection of consumers' financial data, and introducing standards for strong consumer authentication.

Brief Overview of the Directive

The Directive is intended to enhance consumer protection, promote innovation and improve the security of payment services.

The Directive is divided as follows:

Recitals (1) to (113): Setting out the background rationale to the Directive and a commentary relating to individual articles in the Directive.

Title I: Articles 1-4, setting out the subject matter, scope (although this also remains to be determined by reference to later Articles in PSD2), exclusions (payment transactions and services to which PSD2 does not apply) as well as definitions of certain terms used in PSD2;

Title II: Articles 5–37, relating to the establishment of, and rules applicable to, payment institutions (as well as other legal or natural persons) authorised to provide payment services; provisions in relation to access to payment systems; competent authorities and supervision; and a prohibition on the provision of payment services by persons who are not payment service providers;

Title III: Articles 38-60, transparency of conditions and information requirements for payment services; setting out detailed rules relating to the provision of information to payment service users and the applicable contractual obligations, fees and charges relating to the provision of such

information, including where a payment order is initiated through a payment initiation service provider;

Title IV: Articles 61-103, rights and obligations in relation to the provision and use of payment services, confirmation on the availability of funds, rules on access to payment accounts by payment initiation services and account information services, rules on the movement of funds from the placement of a payment order through to execution, receipt and refund, as applicable, of a payment; rules on incident reporting and authentication; rules as to liability and redress; ADR;

Title V: Articles 104-106, delegated acts and regulatory technical standards;

Title VII: Articles 107-117, final provisions relating to PSD2 transitional provisions (particularly relevant to authorisation of payment institutions and other legal persons), member state harmonisation and the consequential repeal or amendment of existing EU regulations or directives; and

Annex: Setting out a list of payment services to which PSD2 applies.

4. National Discretions in PSD2 (and Consultation Questions)

PSD2 states in **Article 107** that, insofar as its terms contain harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in the Directive. However, there are a number of provisions in PSD2 to which full harmonisation does not apply and Member States are given discretion as to whether and how to apply these provisions. These discretions are listed below along with the related consultation question or questions.

18 of the 22 discretions listed were also contained in PSD1. In cases where the discretion was also contained in PSD1, we have outlined the policy decision that was made in Ireland and have asked whether this decision should remain in force under PSD2.

4.1 CHAPTER I: SUBJECT MATTER, SCOPE AND DEFINITIONS

Discretion 1: Exemptions from PSD2 [Article 2, point 5]

Article 2 of PSD2 concerns its scope and permits Member States to exempt certain institutions from authorisation even though they are carrying on one or more forms of business as a credit institution. In an Irish context, this permits us to exempt credit unions from the application of all or parts of PSD2.

Q.1 *Under PDS1 credit unions are not required to be authorised as payment institutions, though they are permitted (under Regulation 8 of the Irish transposing legislation) to provide payment services. Should this remain the same under PSD2?*

4.2 CHAPTER II: PAYMENT SERVICE PROVIDERS

Discretion 2: Regulation and supervision of payment institutions [Articles 8 and 9]

PSD2 allows for payment institutions to provide and execute payment services throughout the Union.

How payment institutions are to be regulated and supervised on a national basis is covered within the framework set out in Title II of PSD2. The main discretion issues that arise in that regard are summarised below.

Consolidated Supervision [Article 8, point 3]

Member States or their competent authorities may choose not to apply **Article 9** (the own funds requirement) of the Directive to payment institutions which are included in the consolidated supervision of the parent credit institution.

Q.2 *Under PSD1, this discretion was given to the Central Bank. Should this continue to be left up to the Central Bank under PSD2?*

Own Funds [Article 9]

PSD2 provides three potential methods for calculation of ongoing reserve capital requirements for payment institutions.

All essentially involve applying a percentage to some measure that reflects the size of the institution – either its overheads, payment volume or operating income. Under PSD1, the Central Bank of Ireland was given the role of directing which method an applicant should use.

Q.3 *Should the determination of which of the three methods is most appropriate continue to be made on a case by case basis by the Central Bank?*

Discretion 3: Professional secrecy [Article 24, point 3]

Member States are required to ensure that all persons who work or who have worked for the competent authorities are bound by the obligation of professional secrecy **[Article 24, point 1]**. In the exchange of information in accordance with **Article 26**, professional secrecy shall be strictly applied to ensure the protection of individual and business rights **[Article 24, point 2]**.

Q.4 *Member States may apply Article 24 taking into account Articles 53 to 61 (regarding the exchange of information and professional secrecy) of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms. Under PSD1, we did not exercise this discretion. Should we reconsider under PSD2?*

Discretion 4: Periodic reporting and creation of central contact point within member states [Article 29]

The competent authorities of the host Member States may require that payment institutions having agents or branches within their territories shall report to them periodically on the activities carried out in their territories **[Article 29, point 2]**.

Q.5 *Article 29, point 2 is a new discretion that was not contained in PSD1. Should we require payment institutions with agents or branches to report periodically to the competent authority of the host Member State?*

Under **Article 29, point 4**, Member States may require payment institutions operating on their territory through agents under the right of establishment, the head office of which is situated

in another Member State, to appoint a central contact point in their territory to ensure adequate communication and information reporting on compliance with Titles III and IV.

Q.6 *Article 29, point 4 is a new discretion that was not contained in PSD1. Should we require payment institutions to appoint a central contact point in the Member State in which they are operating through agents under the right of establishment?*

Discretion 5: Waiver of authorisation exemption for certain legal or natural persons providing payment services on a non-cross border basis [Article 32, point 1] and Discretion 6: Restriction of business activities [Article 32, point 4]

Article 32, point 1 permits Member States to waive, or allow their competent authorities to waive, the application of the various payment institution authorisation procedures and conditions set out in Title II, and thereby allow “natural or legal persons” to be entered in the payment institution register provided for under **Article 14**. The waiver would only apply to individuals or business entities carrying on a payment service business on a national or domestic basis (and thus not passporting into other EU Member States), which have their head office in the Member State of registration, and which have an annual throughput of payments which does not exceed an average of €3m per month. To the extent that a waiver is granted, Member States may also provide that any natural or legal person registered in accordance with paragraph 1 of **Article 32** may engage only in certain activities listed in **Article 18 [Article 32, point 4]**.

Q.7 *Under PSD1, the Central Bank has the discretion to waive authorisation for small payment institutions. Should the Central Bank as competent authority continue to have this discretion under PSD2?*

Q.8 *There was an equivalent waiver under Article 26 of PSD1. In cases where the waiver was granted, institutions might be permitted to engage only in certain activities. Should this remain the same under PSD2?*

Discretion 7: Application of Title III (provision of information by the payment service provider) for the benefit of micro-enterprises [Article 38, point 2]

The term “micro-enterprise” is defined as meaning “an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed €2m” **[Article 4, point 36]**.

Title III of PSD2 sets out a broad range of information and contractual requirements relating to the provision of payment services to users. Title III is mandatory in so far as “consumers” are concerned.

Member States are, however, given discretion as to whether to apply Title III to micro-enterprises in the same way as to consumers [**Article 38, point 2**].

Q.9 *Under PSD1, Title III has been applied to microenterprises in the same way as to consumers. Should this remain the case and why?*

4.3 CHAPTER III: TRANSPARENCY OF CONDITIONS AND INFORMATION REQUIREMENTS FOR PAYMENT SERVICES

Discretion 8: Varying the threshold amount of small value payment instruments and electronic money from which PSD2 information requirements may be derogated [Article 42, point 2].

This discretion applies only to “national payment transactions” (i.e. transactions where both the parties are within one particular country) concerning payment instruments which; a) are low value individual payment transactions (€30); b) have low spending limits (€150); or c) have low limits for storage of funds (€150) [**Article 42, point 1**]. Member States may reduce or double these thresholds and may increase the threshold to €500 for pre-paid payment instruments.

Q.10 *Under PSD1, we doubled the low value transaction limits to €60 and the low spending limits and the low storage limits to €300. We also set the threshold for prepaid payment instruments at €500. What are the merits of retaining this policy under PSD2?*

Discretion 9: Providing for more favourable termination provisions for payment service users in relation to framework contracts [Article 55, point 6]

Article 55 permits a payment service user to terminate a framework contract (which is similar to standard terms and conditions between a payment service provider and a customer) at any time, unless the parties have agreed on a period of notice. Such notice is not to exceed one month. Termination of the framework contract will be free of charge for the payment service user except where the contract has been in force for less than 6 months (this was 12 months under PSD1).

The payment service provider must give at least two months’ notice prior to terminating the framework contract.

Finally, **Article 55** enables Member States to provide for more favourable provisions for payment service users on termination of such a contract.

Q.11 *Under PSD1, we did not provide for more favourable provisions for payment service users in respect of termination of a framework contract. Should this remain the same under PSD2?*

Discretion 10: Information for the payer on individual payment transactions [Article 57, point 3]

A framework contract shall include a condition that the payer may require the information referred to in **Article 57, point 1** to be provided or made available periodically, at least once a month, free of charge, and in an agreed manner which allows the payer to store and reproduce information unchanged. **[Article 57, point 2]**

However, Member States may require payment service providers to provide information on paper or on another durable medium at least once a month, free of charge. **[Article 57, point 3]**

Q.12 *There was a similar discretion under PSD1 concerning the provision of information on paper, which we did not exercise. Should the discretion available under PSD2 to require payment service providers to provide information to the payer at least once a month, free of charge, on paper or another durable medium be exercised?*

Discretion 11: Information for the payee on individual payment transactions [Article 58, point 3]

A framework contract shall include a condition that the information referred to in **Article 58, point 1** be provided or made available periodically, at least once a month, free of charge, and in an agreed manner which allows the payee to store and reproduce information unchanged **[Article 58, point 2]**.

However, Member States may require payment service providers to provide information on paper or on another durable medium at least once a month, free of charge **[Article 58, point 3]**.

As with Question 12 this discretion also covers the provision of information by a payment service provider, the difference being that here the information is for the payee rather than the payer.

Q.13 *There was a similar discretion under PSD1 concerning the provision of information on paper which Ireland did not exercise. Should the discretion available under PSD2 to require payment service providers to provide information to the payee at least once a month, free of charge, on paper or another durable medium be exercised?*

4.4 CHAPTER IV: RIGHTS AND OBLIGATIONS IN RELATION TO THE PROVISION AND USE OF PAYMENT SERVICES

Discretion 12: Exclusion of the alternative dispute resolution procedures where the payment service user is not a consumer [Article 61, point 2]

Article 102 of PSD2 requires Member States to ensure that adequate, independent, impartial, transparent and effective alternative dispute resolution procedures are established for the settlement of disputes between payment service users and payment service providers.

Article 61, point 2 allows that Member States may provide that **Article 102** does not apply where the payment service user is not a consumer.

Accordingly, it is a matter for Member States to determine whether alternative dispute resolution procedures under **Article 102** should apply where the payment service user is not a consumer.

Q.14 *Under PSD1, it was decided that microenterprises, as well as consumers, should be able to use alternative dispute resolution procedures (or “out-of-court complaint and redress procedures” as this was referred to in PSD1). Should that remain the same under PSD2?*

Discretion 13: Application of Title IV; rights and obligations in relation to the provision and use of payment services [Article 61, point 3]

Title IV of the PSD sets out a number of detailed rules relating to, for example, common provisions, charges applicable, discretion for low value payment instruments and electronic money, rules on access to payment accounts in the case of payment initiation services, and obligations of the payment service provider in relation to payment instruments.

Title IV applies to all payment service users, though a number of the more important provisions can be dis-applied by contract as between the payment service provider and the payment service user. However, in the case of a payment service user who is a consumer, the Title IV provisions are mandatory and cannot be contracted out of.

Again, however, Member States have discretion to determine whether the provisions of Title IV should be applied to micro-enterprises in the same way as consumers.

Q.15 *Since the implementation of PSD1, Title IV has been applied to microenterprises in the same way as consumers. Should it remain the case that this part is applied to micro-enterprises in the same way as consumers?*

Discretion 14: Prohibiting or limiting the right of a payment service provider to request charges in respect of the use of a given payment instrument [Article 62, point 5].

According to **Article 62**, the payment service provider shall not prevent the payee from requesting from the payer a charge, offering him a reduction or otherwise steering him towards the use of a given payment instrument. Any charges applied shall not exceed the direct costs borne by the payee for the use of the specific payment instrument.

Under PSD2 the payee shall not request charges for the use of payment instruments for which interchange fees are regulated under Chapter II of Regulation (EU) 2015/751 and for those payment services to which Regulation (EU) No 260/2012 applies.

Finally, Member States are given the option to prohibit or limit the right of the payee to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments.

Q.16 *Under PSD1, the payment service provider was not permitted to prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument. Under PSD2, surcharging will not be permissible for the vast majority of consumer payments. Should we prohibit or further limit the right of the payee to request charges?*

Discretion 15: Derogation for low value payment instruments and electronic money [Article 63, point 2]

Article 63 sets out various derogations from the execution and liability rules contained in Title IV that payment service providers may agree with their payment service users in the case of low value payment instruments issued under a framework contract.

There is also a Member State discretion [**Article 63, point 2**] which applies only to “national payment transactions” (i.e. transactions where both the parties are within one particular country) using payment instruments which solely concern individual payment transactions not exceeding €30 or which either have a spending limit of €150, or store funds which do not exceed €150 at any time. Member States or their competent authorities may reduce or double these thresholds and may increase the thresholds to €500 for pre-paid payment instruments.

Q.17 *Under PSD1, we doubled the low value transaction limits to €60 and the spending limits and storage limits to €300. We also set the threshold for prepaid payment instruments at €500. Are there merits to retaining this policy under PSD2?*

Discretion 16: Liability for unauthorised transactions [Articles 73 and 74]

Articles 73 and 74, whereby the payment service provider is liable to refund the payer the amount of any unauthorised transactions (though the payer can be liable for up to €50) apply equally to electronic money, except where the payer's payment service provider does not have the ability to freeze the payment account on which the electronic money transfer is stored or block the payment instrument [**Article 63, point 3**].

Q.18 *Under PSD1, the payer's payment service provider is not liable for unauthorised electronic money transactions where it does not have the ability to freeze the payment account or block the payment instrument. Should this remain the same under PSD2?*

Discretion 17: Liability for unauthorised transactions [Article 74, point 1]

Ordinarily, the payer may be obliged to bear the losses relating to any unauthorised payment transactions, up to a maximum of €50, resulting from the use of a lost or stolen payment instrument or from the misappropriation of a payment instrument.

However, where the payer has neither acted fraudulently nor intentionally failed to fulfil his or her obligations under **Article 69**, Ireland may reduce the liability referred to in this paragraph taking into account, in particular, the nature of the personalised security credentials and the specific circumstances under which the payment instrument was lost, stolen or misappropriated.

Under PSD1, Ireland exercised the option to reduce the maximum amount of loss a payer will bear when he or she has neither acted fraudulently nor with intent in failing to fulfil his or her obligations. We reduced the €150 maximum limit permitted by the Directive to €75.

Q.19 *Under PSD2, the maximum limit is to be €50. Member States may reduce the liability to less than the €50 limit. Under PSD2, should we further reduce the liability of the payment service user?*

Discretion 18: More favourable refund rights for direct debits in currencies other than euro [Article 76, point 4]

Article 76, point 4 states that for direct debits in currencies other than euro, Member States may require their payment service providers to offer more favourable refund rights in accordance with their direct debit schemes provided that they are more advantageous to the payer.

Ireland is part of the Single Euro Payments Area and does not have an indigenous direct debit scheme.

Q.20 *Is there any situation in which you believe this discretion would be applicable in Ireland?*

Discretion 19: For national payment transactions, Member States may provide shorter maximum execution times than provided for in Title IV [Article 86].

In Ireland this discretion would apply to payment transactions between accounts within the same institution.

Q.21 *Under PSD1, we did not implement shorter maximum execution times. Should this remain the same in Ireland once PSD2 comes into effect or should there be shorter maximum execution times for national payment transactions?*

Discretion 20: Alternative Dispute Resolution Procedures [Article 101, point 2]

Under **Article 101, point 2**, payment service providers must make every possible effort to reply to complaints from payment service users concerning rights and obligations arising under Titles III and IV of PSD2 within an adequate time frame and at the latest within 15 business days of receipt of the complaint. In exceptional situations, set out in the Directive, the deadline for receiving the final reply may extend to 35 business days.

This is a new provision included in PSD2 and includes a discretion that Member States may introduce or maintain rules on dispute resolution procedures that are more advantageous to the payment service user.

Q.22 *Under PSD2, we may introduce rules that are more advantageous to payment service users. Should such rules be introduced and, if so, what would be an appropriate time frame for responding to a complaint?*

4.5 CHAPTER V: DELEGATED ACTS AND REGULATORY STANDARDS

Discretion 21 and Discretion 22: Authorisation of payment institutions [Article 109]

According to **Article 109, point 2**, Member States may provide for payment institutions that have taken up activities under PSD1 to be automatically granted authorisation and entered in the registers referred to in **Articles 14** and **15** if the competent authorities have evidence that the requirements laid down in **Articles 5** and **11** are complied with. According to **Article 109, point 4**, Member States may provide for natural and legal persons benefitting from the waiver under Article 26 of Directive 2007/64/EC to be automatically entered in the registers referred

to in **Articles 14** and **15** if the competent authorities have evidence that the requirements laid down in **Article 32** are complied with.

Under PSD1, the Central Bank was given discretion under Article 26 to waive the application of all or part of the usual procedure and conditions for authorisation in the case of small payment service providers. To date, Ireland has not exercised that discretion.

Q.23 *Under PSD2, should provision be made for existing payment institutions and e-money institutions to be authorised and entered into the registers by the competent authority in this way?*