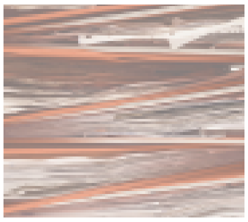


A full in-tray

BOB LYDDON EXPLORES HOW THE EU'S PAYMENT SERVICES DIRECTIVE WILL AFFECT THE CORPORATE CUSTOMER.

Executive summary

The likelihood is that the Payment Services Directive, which comes into force this year, will lead to wholesale changes in banks' terms and conditions. Treasurers have a mountain of detail to master to ensure that they choose the best payments route for their companies.

The European Commission's Payment Services Directive will become national law throughout most of Europe from November this year. It will not only apply to the EU member states, but also Iceland, Liechtenstein and Norway (the 30 countries that together constitute the European Economic Area, or EEA); Swiss banks also intend to adopt its provisions into their general banking conditions.

While the directive's main aim is consumer protection (although it adds little to existing protection in countries like Belgium and Finland), it offers no blanket exemption for corporates as a group or those above a certain size. Instead, it envisages that corporates will sign framework contracts with their banks to deal with those areas of payment services where the directive specifically permits a different treatment than the base one.

Box 1: The ACT's PSD workshop – 30 June 2009

The Payment Services Directive (PSD) comes into force this November, bringing with it the likelihood of wholesale changes in banks' terms and conditions. This essential update will enable you to understand the potential impact of this change in European legislation and to take early action to maximise the benefits while limiting possible downside.

The course provides an overview of what the PSD means to corporates, the opportunities it offers for efficiencies and greater transparency, and the threats to realising those opportunities.

For details of the workshop and a **10% discount**, go to **www.treasurers.org/training/psd/jun09**
For more information, contact **training@treasurers.org**

Many corporates probably already have agreements with their payment banks which could be classified as framework contracts under the directive. It would be a stroke of luck if these agreements matched the Payment Services Directive in both scope and content. A more likely scenario, though, is that most corporates will face a very full in-tray of substitute contracts/unilateral amendments in the autumn.

That is one reason why the ACT has decided to arrange a workshop on the Payment Services Directive in London on 30 June (see Box 1) to brief corporates in greater detail.

The base scope of the directive covers electronic payments – including card payments and direct debits but excluding cash and cheques – where both endpoints are in the EEA. Payments must be in euros or a member state currency, and cover the Norwegian krone, the Icelandic krone and the Swiss franc to/from Liechtenstein. Swiss banks will apply the directive's terms to Swiss franc transactions to/from Switzerland at their end, although banks in EEA countries are not legally bound to treat them as in-scope at their end.

This is one anomaly that corporates will want to be aware of, and is a feature of the so-called leg-in/leg-out discussion: this is not a folk dance but an aspect of transposition where certain countries have elected to extend the scope of the directive in their environment to further currencies and endpoints outside the EEA.

And the anomalies do not end there. The Payment Services Directive contains specific rights of derogation, with member states permitted to adopt or ignore certain provisions. The ones of greatest interest to the corporate are:

- for smaller corporates, whether micro-enterprises are to be treated as consumers by law or not;
- shorter termination of framework contracts; and
- whether out-of-court complaints and redress procedures will only be available to consumers (which may include micro-enterprises).

Further country-level differences can be anticipated due to translation, interpretation and how transposition takes place. Some countries are introducing one law; others are amending existing laws. In the UK the definitive interpretation will be

derived from case law – after implementation. In Spain the banks can go to the Bank of Spain and present an interpretation in advance and have it stamped: that then becomes definitive. Some countries will just have the law itself; in others the state council will deliver detailed regulations. Place your bets on the chance of harmonisation!

In terms of substance, the directive has three main sections:

- the introduction of a new type of capital/regulation-lite competitor to bank payment service providers (PSPs), described as payment institutions and contemplated as being for the unbanked and worker remittances, so not particularly relevant for corporates unless they want to set up their own;
- the transparency of conditions and information requirements; and
- the rights and obligations in relation to the provision and use of payment services.

The latter two section (titles III and IV respectively of the directive) are the meat as far as a framework contract is concerned, although a PSP and its corporate customer can opt out of title III, which lays down:

- the minimum information to be supplied before a contract is entered into to make a payment;
- the minimum information to be supplied afterwards to both payer (to prove fulfillment) and to payee (to tell them they received the money, who from and why);
- the provision of information by PSPs about how the service can be used, electronic banking requirements, timings, charges and spending ceilings; and
- how communications with the PSP work, security, how contracts are to be amended and terminated, and redress.

For corporates it is much more convenient to use one electronic banking contract to govern all activity rather than to get a contract every time a payment is requested. However, corporates undoubtedly want that single e-banking contract to cover at least all of the above aspects and to the same standard – which is their right if they do not sign a framework contract. Title IV does the following:

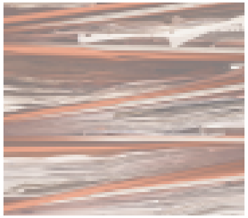
- moves the burden of proof for authorisation of payments to the PSP;
- limits a customer's liability to €150 if a payment instrument (such as a card, a token or an electronic banking authorisation device) is misused;
- defines the rights of refund;
- provides for all payments to be charged on an SHA (shared) basis;
- forbids deductions from the principal;
- orders the payee's bank to put incoming payments at the payee's disposal immediately (ie, in the ledger balance, in the available balance, and with that day's value);
- limits end-to-end timing to D+3 at worst between 1 November 2009 and 31 December 2011, and D+1 at worst thereafter; and
- does not allow any float for payee banks.

Table 1: The opt-outs

ARTICLE 54 (2) Consent and withdrawal of consent	■ Sub-para 1: The payer has to give consent to individual payments or, under a framework contract, to a series; payer and bank agree the form of consent ■ Sub-para 2: "In the absence of such consent, a payment transaction shall be considered unauthorised" ■ Sub-para 2 can be waived, but what auditor would permit that as a routine solution to a breach of an agreed process?
ARTICLE 59 Evidence on authentication and execution of payment transactions	■ The bank has to provide proof of proper authorisation, rather than the customer having to prove defective authorisation or non-authorisation ■ Use of a payment instrument is not in itself sufficient to prove due authorisation
ARTICLE 63 Requests for refunds for payment transactions initiated by or through a payee	■ Enacts eight weeks' right to claim a refund, which is vital to SEPA direct debit; there is no right of national derogation to vary this ■ A bank has 10 days from the request to pay it or explain why the refund will not be paid ■ Enables shorter reclaim period for business-to-business direct debits
ARTICLE 75 Non-execution and defective execution	■ Payer's bank is liable for execution up to when it can prove it put funds into the account of the payee's bank ■ If the payer's bank is liable, the bank has to make good the payer's account ■ If funds have been put onto the account of the payee's bank, then the payee's bank has to make the payee's account good ■ Whoever is liable, the payer's bank must investigate, trace and notify the payer of the outcome

Table 2: The non-negotiables

ARTICLE 67 Amounts transferred and amounts received	■ No deductions from principal by payer's bank and any intermediaries
ARTICLE 69 Payment transactions to a payment account	■ Cycle time can be up to D+3 until 31 December 2011 by mutual agreement, but must be D+1 after that, with no need for any agreement ■ One day more for paper-based payments
ARTICLE 73 Value date and availability of funds	■ A bank must credit the payee no later than the day on which an incoming payment was received by the bank itself – ie, when it was credited to the bank's own account ■ The bank must ensure funds are available to the payee immediately they are credited to the bank's own account ■ The debit value date for the payer is no earlier than when the payment was debited to the payer's account



TO DEAL WITH A FULL IN-TRAY, TREASURERS NEED CLARITY ON WHAT THEY GET FROM THE PAYMENT SERVICES DIRECTIVE BY LAW, AND HOW CURRENT TERMS AND CONDITIONS

A corporate and its bank can opt out of certain features of the directive or vary them in a framework contract, including the first three points listed on the previous page for Title IV. Opt-outs exist for articles 52(1), the second sub-para of 54(2), 59, 61, 62, 63, 66 and 75 (which can be varied in whole or in part) and 58 (where a different time period can be agreed).

Much of the directive is designed to protect consumers – the logic of the drafters was that large corporates could look after their own interests – but in practice companies may want those protections or at least use them as the starting point for negotiating their own framework contract.

These articles will be gone through in detail in the ACT's Payment Services Directives course, so the articles commented on in Tables 1 and 2 are meant to give a flavour of what is and isn't available for opt-out.

In order to prepare to deal with a full in-tray, treasurers need clarity on what they get from the Payment Services Directive by law, and how current terms and conditions contrast with that. Discounting the idea that banks might simply stop executing or receiving payments for clients unless they get the new documents they want, a corporate would want to establish the benefits that will flow without their signing a framework contract – in other words, by being treated as a consumer.

The inconveniences of not signing a framework contract (for example, payments might have to be contracted for individually, making e-banking superfluous) provide the basic trading material, although the inconvenience would be for the PSP as well.

Corporates may trade away title III in the form of an electronic banking contract with substantially the same provisions as title III.

Title IV presents the more challenging negotiation. The negotiable provisions all seem to have benefits for the corporate, so why would the corporate wish to trade them away and what for? What would a corporate do if a bank presented a framework contract as a series of one-way communications that it did not ask the corporate to countersign, and which represented various opt-outs? What if all the papers land on the desk in October and have to be processed by November? These are hard questions and ones that will be gone into in the ACT workshop on the Payment Services Directive.

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