

Chapter 15

Guidance on the scope of the Payment Services Regulations 2017

15.2 General

Q1. Why does it matter whether or not we fall within the scope of the PSRs 2017?

Broadly, when you provide payment services, as a regular occupation or business activity

, in the UK and these services do not fall within an exclusion or exemption, you must be:

- (a) an authorised payment institution; or
- (b) (c) a small payment institution; or
 - a registered account information services provider; or
- (d) a credit institution (with a Part 4A permission to accept deposits); or
- (e) an electronic money institution; or
- (f) the Post Office Limited, Bank of England or government departments and local authorities; or
- (g) an exempt person (that is a credit union, municipal bank and the National Savings Bank)
- (h) Unless you are one of the above (or acting as an agent – see ■ PERG 15.4), subject to transitional provisions you risk committing a criminal offence under regulation 138.

Q2. Is there anything else we should be reading?

The Q&As complement, and should be read in conjunction with, the PSRs 2017. The FCA provides guidance on its regulatory approach under the PSRs 2017 in its Approach Document.

Q3. How much can we rely on these Q&As?

The answers given in these Q&As represent the FCA's views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of the PSRs 2017 affects the regulatory position of any particular person will depend on his individual circumstances. If you have doubts about your position after reading these Q&As, you may wish to seek legal advice. The Q&As do not purport to be exhaustive and are not a substitute for reading the relevant legislation. In addition to FCA guidance, some PSD2 provisions (from which the PSRs 2017 are derived) may be the subject of guidance or communications by the European Commission or the European Banking Authority.

Q4. We are a UK firm not authorised under FSMA providing payment services to our clients, as a regular business activity. Are we required to be authorised or registered under the regulations?

Yes, unless the exclusions or exemptions in the regulations apply to you or you are an electronic money institution, the Post Office Limited or an agent of a credit institution or electronic money institution. If this is not the case, you need to be:

- authorised by the FCA as an authorised payment institution; or
- registered as a small payment institution; or
- registered as an account information services provider; or
- registered as an agent of an authorised payment institution or a small payment institution.

Q5. As a payment institution rather than a credit institution, are we right in thinking that our maintenance of payment accounts does not amount to accepting deposits?

Yes, articles 9AB and 9L of the *Regulated Activities Order* provide that funds received by payment institutions from payment services users with a view to the provision of payment services shall constitute neither deposits nor *electronic money*.

As a payment institution, any payment accounts you hold must only be used in relation to payment transactions (see regulation 33 of the PSRs 2017). A "payment transaction" for these purposes is defined in regulation 2 of the PSRs 2017 as meaning "an act, initiated by the payer or payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and payee". Our view is that this means that a payment institution cannot hold funds for a payment service user unless accompanied by a payment order for onward transfer (whether to be executed immediately or on a future date). Funds cannot be held indefinitely. They should not be held for longer than is necessary for operational and technical reasons.

The fact that a payment account operated by a payment institution can only be used for payment transactions distinguishes it from a deposit. A deposit can nevertheless be a form of payment account (for example a bank current account is both a deposit and a payment account). For guidance on what constitutes a deposit for the purposes of the regulated activity of "accepting deposits" and guidance on the regulated activity itself, see ■ PERG 2.6.2 G to ■ 2.6.4 G and ■ PERG 2.7.2 G.

A payment institution is not prohibited from paying interest on a payment account but such interest cannot be paid from funds received from customers. More generally, if a payment institution were to offer savings facilities to its customers in the accounts it provides, in our view it would be holding funds not simply in relation to payment transactions and so would be in breach of regulation 33.

Q6. We are a credit card company and a payment institution. We are not a bank. Sometimes our customers will have a positive balance on their account because they have accidentally overpaid or because of refunds. Would this put us in breach of the requirement in regulation 33 that payment accounts held by payment institutions may be used only in relation to payment transactions?

No. In our view, this does not amount to a breach of regulation 33 and nor does the handling of credit balances in the circumstances constitute the activity of accepting deposits.

Q7. We are a credit institution. Do the PSRs 2017 apply to us?

Yes. If you are a credit institution, you will be subject to the conduct of business requirements in the PSRs 2017 to the extent that you provide payment services. The authorisation process applying to credit institutions remains that imposed by Part 4A of the Act. Authorised credit institutions will do not though need to apply for a separate Part 4A permission, in order to provide payment services. In other words, if a UK credit institution has a Part IV permission to carry on the regulated activity of accepting deposits, it will not need to be separately authorised to provide payment services in the UK. However, credit institutions intending to provide account information services or payment initiation services should have regard to the notification requirements in ■ SUP 15.8. The UK branch of a non-UK credit institution with a Part 4A permission to accept deposits is also authorised to provide payment services in the UK.

Q8. We are an electronic money institution. Do the PSRs 2017 apply to us?

Yes. If you are an electronic money institution, you will be subject to the conduct of business requirements in the PSRs 2017. If you are a credit institution, a credit union or a municipal bank, issuing electronic money is a regulated activity and you will require permission under the Act (see ■ PERG 2.6.4A). The authorisation and registration requirements for any other person intending to issue electronic money are governed by the Electronic Money Regulations (see ■ PERG 3A for guidance on the scope of the Electronic Money Regulations). If you are an authorised or small electronic money institution, the PSRs 2017 introduce a transitional provision into the Electronic Money Regulations which affects your right to continue to provide services in the UK after 12 July 2018 – see ■ PERG 3A.7.

Q9. If we provide payment services to our clients, will we always require authorisation or registration under the regulations?

Not necessarily; you will only be providing payment services, for the purpose of the regulations, when you carry on one or more of the activities in ■ PERG 15 Annex 2:

- as a regular occupation or business activity; and
- these are not excluded or exempt activities (see ■ PERG 15.5 Negative scope/exclusions).

Simply because you provide payment services as part of your business does not mean that you require authorisation or registration. You have to be providing payment services, themselves, as a regular occupation or business to fall within the scope of the regulations (see definition of "payment services" in regulation 2(1)). In our view this means that the services must be provided as a regular occupation or business activity in their own right and not merely as ancillary to another business activity. Accordingly, we would not generally expect the following to be providing payment services as a regular occupation or business activity:

- solicitors or broker dealers, merely through operating their client accounts in connection with their main professional activities;
- letting agents, handling tenants' deposits or rent payments in connection with the letting of a property by them;
- debt management companies, receiving funds from and making repayments for a customer as part of a debt management plan being administered for that customer;

- individuals initiating payments and dealing with payment account information for another person under a power of attorney they have entered into in a personal capacity, for example for a family member; and
- operators of loan or investment based crowd funding platforms transferring funds between participants as part of that activity.

The fact that a service is provided as part of a package with other services does not, however, necessarily make it ancillary to those services – the question is whether that service is, on the facts, itself carried on as a regular occupation or business activity.

Q10. [deleted]

Q11. Is it possible to be both an authorised person under FSMA and the agent of an authorised payment institution, a small payment institution or a registered account information provider?

Yes. There is nothing in the PSRs 2017 or the Act (for example section 39) which prevents a person from being both an authorised person and the agent of an authorised payment institution or a small payment institution or a registered account information provider.

Q11A. Is it possible to be both an authorised person under FSMA and an authorised payment institution, a small payment institution or a registered account information provider?

Yes. There is nothing in the PSRs 2017 or the Act which prevents a person from being both an authorised person and an authorised payment institution, a small payment institution or a registered account information provider. In some cases, for example if you issue credit cards (see further Q20A), it is likely that you will need permissions under the Act and the PSRs 2017 in order to provide your services.

Q11B. Is it possible to be both an authorised payment institution and the agent of an authorised payment institution, a small payment institution or a registered account information provider?

Yes. There is nothing in the PSRs 2017 which prevents a person from being both an authorised payment institution or electronic money institution and the agent of an authorised payment institution, a small payment institution or a registered account information provider. However, businesses will need to make clear to payment service users the capacity in which they are providing services, in accordance with regulation 34(16) and consumer protection legislation.

Q12. We provide electronic foreign exchange services to our customers/clients. Will this be subject to the PSRs 2017?

Not necessarily, as providing foreign exchange services is not itself a payment service. Foreign exchange transactions may exist as part of, or independent from, payment services. You will fall within the scope of the PSRs 2017 if you are providing payment services, by way of business, in the UK. For example, where a customer instructs their bank to make payment in euros from the customer's sterling bank account to a payee's bank account, we expect conduct of business requirements in the regulations to apply to the transfer of funds including information requirements relating to the relevant exchange rate.

By contrast, we would not expect the conduct of business provisions (including the right of cancellation) in the Payment Services Regulations to apply to a spot or forward fx transaction itself. That said, the electronic transmission, for example, by a bank on behalf of a customer to an fx services provider is likely to be subject to the PSRs 2017, because this is a transfer of funds executed by the bank. Similarly, the onward payment by a bank or fx services provider, on behalf of a client, to a third party of currency purchased in an fx transaction may amount to a payment service.

If you are a small payment institution or an authorised payment institution under the PSRs 2017, you may provide foreign exchange services that are closely related and ancillary to your payment services. However, that does not allow you to provide foreign exchange derivative services that would otherwise require authorisation under FSMA. You therefore need to consider the availability of exclusions for your foreign exchange business (see ■ PERG 13 Q31K).

Q13. We are a business that does not provide payment services. We usually accept payment in sterling for our goods and services but also offer a facility to our customers who prefer to pay us in other currencies, to do so on the basis of a currency conversion when making electronic payments via their payment service provider. Do the regulations apply to us?

Generally no. You are not required to be authorised or registered under the regulations. You will though be required to disclose information relating to your currency conversion service, including charges and the exchange rate to be used (for further information including details of criminal sanctions, see regulations 57 and 141).