

**PERIMETER GUIDANCE (PAYMENT SERVICES SCOPE)
INSTRUMENT 2009**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of its powers under:
- (1) section 157(1) (Guidance) of the Financial Services and Markets Act 2000;
 - and
 - (2) regulation 93 of the Payment Services Regulations 2009.

Commencement

- B. This instrument comes into force on 1 November 2009.

Amendments to the Perimeter Guidance manual

- C. The Perimeter Guidance manual (PERG) is amended in accordance with the Annex to this instrument. The general guidance in PERG does not form part of the Handbook.

Citation

- D. This instrument may be cited as the Perimeter Guidance (Payment Services Scope) Instrument 2009.

By order of the Board
26 March 2009

Annex

Amendments to the Perimeter Guidance manual (PERG)

In this Annex, underlining indicates new text and striking through indicates deleted text, except where otherwise stated.

1.4.2 G Table: list of general guidance to be found in *PERG*.

Chapter:	Applicable to:	About:
...		
<u>PERG 15: Guidance on the scope of the Payment Services Regulations 2009</u>	<p><u>Any person with an establishment in the UK who needs to know whether the Payment Services Directive, as transposed in UK legislation by the Payment Services Regulations 2009, applies to him.</u></p> <p><u>Q46 applies specifically to persons providing payment services from an establishment outside the EEA to persons located in the UK.</u></p>	<u>the scope of the PSD Regulations 2009.</u>

After PERG 14 insert the following new chapter. The inserted text is not underlined.

15. Guidance on the scope of the Payment Services Regulations 2009

15.1 Introduction

The purpose of this chapter is to help businesses in the UK consider whether they fall within the scope of the Payment Services Directive (2007/64/EC) (PSD), as given effect to in the Payment Services Regulations 2009 (the “PSD regulations”). The PSD regulations create a separate authorisation and registration regime which differs from the authorisation requirements under the Financial Services and Markets Act. In particular, it is aimed at helping these businesses consider whether they need to be separately authorised or registered for the purposes of providing payment services in the UK. References to individual regulations are to the PSD regulations, unless otherwise stated.

Background

PSD provides the legal framework for the operation of a single market in payment services. This includes the creation of a harmonised authorisation regime, designed to establish a single licence for payment service providers which are neither deposit-takers nor e-money issuers. Authorised payment institutions can provide services on a cross-border or branch basis, using passport rights acquired under the PSD.

The relevant payment services, as transposed in the PSD regulations, are set out fully in Annex 2 to this chapter and include, amongst other things, services relating to the operation of payment accounts (for example, cash deposits and withdrawals from current accounts and flexible savings accounts), execution of payment transactions, card issuing, merchant acquiring, money remittance and certain mobile phone-based payment services. The directive focuses on electronic means of payment including direct debit, debit card, credit card, standing order, mobile or fixed phone payments and payments from other digital devices as well as money remittance services; it does not apply to cash-only transactions or paper cheque-based transfers.

Scope

In terms of scope, the PSD regulations are likely to be of relevance to a range of firms including credit institutions, e-money issuers, the Post Office Limited, money remitters, certain bill payment service providers, card issuers, merchant acquirers and certain telecommunications network operators. It is also likely to be relevant to those agents of the above businesses which provide payment services.

Generally speaking, depending on the nature and size of its activities, a business to which the PSD regulations apply (other than a credit institution, e-money issuer or an EEA authorised payment institution) will need to be:

- authorised by the FSA as an authorised payment institution; or
- registered as a “small payment institution”; or
- registered as an agent of an authorised payment institution, EEA authorised payment institution or a small payment institution.

The conditions for authorisation as a payment institution are set out in regulation 6. In addition to the authorisation regime for payment institutions, there is an alternative lighter regime for those which fall within the category of small payment institutions (that is businesses which meet the conditions in regulation 13). Broadly, the category of small payment institutions will only be relevant to firms executing payment transactions with a monthly average of 3 million euros (or an equivalent amount) or less, over a 12 month period. Broadly, small payment institutions are not subject to the authorisation requirements in regulation 6 or the requirements in Part 3 of the PSD regulations (including capital requirements), but they are subject to a registration regime and the conduct of business provisions in Parts 5 and 6.

The PSD regulations also provide for the appointment of agents by authorised payment institutions and small payment institutions. These agents are exempt from the authorisation requirements in regulation 6 but they are required to be registered on the FSA register by their principal. When the agent’s principal is an EEA authorised payment institution, it needs to be registered on the Home State register of that payment institution. A business can also

provide payment services as an agent of a credit institution or e-money issuer, in which case there are no registration requirements under the PSD regulations.

Exemptions and exclusions

As well as small payment institutions and agents, the PSD regulations make provision for a limited number of exempt bodies, notably credit unions and municipal banks. The regulations do not apply to these bodies although municipal banks are required to notify the FSA if they propose to provide payment services.

More generally, there is a broad range of activities which do not constitute payment services under Schedule 1 Part 2 to the PSD regulations. Amongst these excluded activities, set out more fully in Annex 3, are:

- payment transactions through commercial agents;
- money exchange business (for example, bureaux de change);
- payment transactions linked to securities asset servicing (for example, dividend payments, share sales or unit redemptions);
- services provided by technical service providers;
- payment services based on instruments used within a limited network of service providers or for a limited range of goods or services; and
- payment services provided by telecommunications operators other than as an intermediary between payer and payee.

These and other activities are the subject of Q&A in PERG 15.5. A firm will be exempt from authorisation and registration requirements under the regulations to the extent that its activities fall within one or more of the exclusions in Schedule 1 Part 2 to the regulations. In each case, it will be for businesses to consider their own circumstances and whether they fall within the relevant exclusions.

Other scope issues

As explained in PERG 15.2, Q13, the regulations also apply in limited circumstances to non-payment service providers, if they provide a currency conversion service. Likewise, a non-payment services provider which imposes charges or offers reductions for the use of a given

payment instrument is required to provide information on any such charges or reductions (see regulations 50 and 113).

Transitionals

Subject to the exclusions and exemptions outlined above, a payment institution with an establishment in the UK (other than an EEA payment services provider and its agents) is caught by the authorisation and registration requirements of the PSD regulations when it provides payment services, by way of business, in or from the UK. That said, there are important transitional provisions which delay the need for businesses to apply for authorisation or registration, before and during an initial period after the commencement of regulation on 1 November 2009.

How does this chapter work?

The chapter is made up of Q&As divided into the following sections:

- General (PERG 15.2)
- Payment services (PERG 15.3)
- Small payment institutions, agents and exempt bodies (PERG 15.4)
- Negative scope/exclusions (PERG 15.5)
- Territorial scope (PERG 15.6)
- Transitional arrangements (PERG 15.7)
- Flowcharts and tables (PERG 15 Annexes 1, 2 and 3)

Definitions

The PSD regulations contain their own definitions which you can find in regulation 2. We refer to some of these in the Q&A including “payment transaction”, “payment account”, “payment instrument” and “money remittance”.

15.2 General

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

Broadly, when you provide payment services, by way of business, in the UK and these services do not fall within an exclusion or exemption, you must be:

- (a) an authorised payment institution; or
- (b) an EEA authorised payment institution; or
- (c) a small payment institution; or
- (d) a credit institution (either one with a Part IV permission to accept deposits or an EEA credit institution where it is exercising passport rights under paragraph 4 of Annex 1 to the Banking Consolidation directive); or
- (e) an e-money issuer (that is either an e-money issuer with a Part IV permission or a *small e-money issuer* or an EEA e-money issuer exercising passport rights); or
- (f) the Post Office Limited, Bank of England, a central bank or government departments and local authorities; or
- (g) an exempt person (that is a credit union, municipal bank and the National Savings Bank); or
- (h) an agent of a person listed in (a) to (g) above.

Unless you are one of the above, subject to transitional provisions you risk committing a criminal offence under regulation 110.

Q2. Is there anything else we should be reading?

The Q&As complement, and should be read in conjunction with, the Payment Services Regulations 2009.

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

The answers given in these Q&As represent the FSA's views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of the PSD regulations 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 FSA guidance, some PSD provisions may be the subject of guidance or communications by the European Commission.

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 e-money issuer, the Post Office Limited or an agent of a credit institution or e-money issuer. If this is not the case, you need to be:

- authorised by the FSA as an authorised payment institution; or
- registered as a small payment institution; or
- registered as an agent of an authorised payment institution, EEA authorised payment institution or a small payment institution.

You might find helpful the overview, in the form of flowcharts, of the authorisation and registration requirements in the PSD regulations as they apply to payment institutions (that is payment service providers other than credit institutions, e-money issuers and their agents), set out in PERG 15 Annex 1.

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 e-money.

As an authorised payment institution, any funds you hold must only be used in relation to payment transactions (see regulation 28 of the PSD regulations). A “payment transaction” for these purposes is defined in regulation 2 of the PSD regulations 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”. 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 and 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 2.6.2G to 2.6.4G and PERG 2.7.2G.

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 28.

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 28 to use a payment account only in relation to payment transactions?

No. In our view, this does not amount to a breach of regulation 28 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 PSD regulations apply to us?

Yes. If you are a credit institution, you will be subject to the conduct of business requirements in the PSD regulations to the extent that you provide payment services. In our view, the authorisation process applying to UK and non-EEA credit institutions remains that imposed by Part IV of the *Act*. Authorised credit institutions will not though need to apply for a separate *Part IV 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. We are aware that the Commission has indicated that branches of non-EEA credit institutions are unable to provide payment services in the EEA, in this legal form. Whilst it is for firms to consider their own position, in our view the UK branch of a non-EEA credit institution with a Part IV permission to accept deposits is also authorised to provide payment services in the UK.

An EEA credit institution wishing to provide payment services through a UK branch must exercise its passport rights under paragraph 4 of the Annex to the Banking Consolidation

directive (BCD). Similarly, a UK credit institution which wishes to provide payment services in other Member States may exercise its BCD passport rights to do so.

Q8. We are an e-money issuer. Do the PSD regulations apply to us?

Yes. If you are an e-money issuer, you will be subject to the conduct of business requirements in the PSD regulations. The authorisation regime applying to UK e-money issuers remains that imposed by the *Act* (see PERG 3.2 for guidance about the regulated activity of issuing e-money).

Authorised e-money issuers will not need to apply for a separate Part IV permission, in order to provide payment services. In other words, if you have a Part IV permission to carry on the regulated activity of *issuing e-money*, you will also be authorised to provide payment services to the extent permitted by ELM 4.3. If you are a *small e-money issuer*, you will not be subject to the authorisation requirements of either the *Act* or the PSD regulations.

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.

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)). Accordingly, we would not generally expect solicitors or broker dealers, for example, to be providing payment services for the purpose of the regulations merely through operating their client accounts in connection with their main professional activities.

Q10. We are a “financial institution” under the Banking Consolidation Directive (BCD). How does PSD apply to us?

Financial institutions are only subject to the authorisation and conduct of business requirements of the regulations where they provide payment services by way of business and are unable to rely on any of the statutory exclusions. For those financial institutions which are subject to the regulations, they may be able to benefit from transitional relief from the requirement to be authorised or registered as a payment institution if their parent undertaking is subject to consolidated supervision.

A “financial institution” for the purposes of the PSD regulations, as for the BCD, is an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex 1 to the BCD (see SUP App 3.9.4G). It may include, for example, an authorised person under the *Act* which is neither a credit institution nor an e-money issuer.

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

Yes. There is nothing in the PSD regulations 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.

Q.12 We provide electronic foreign exchange services to our customers/clients. Will this be subject to the PSD regulations?

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 PSD regulations if you are providing payment services, by way of business, in the UK. For example, where a customer instructs his bank to make payment in euros from his 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 PSD, 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.

Q.13 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 euros, to do so on the basis of a sterling/euro 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 49 and 113).

15.3 Payment Services

Q14. Where do we find a list of payment services?

In Schedule 1 Part 1 to the PSD regulations. There are seven payment services, set out in full in Annex 2 to this chapter. References to categories of payment services below adopt the structure of Schedule 1 to the PSD regulations: for example, paragraph (1)(f) refers to “money remittance”.

Q15. When might we be providing services enabling cash to be placed on a payment account (paragraph 1(a))?

When you are accepting cash electronically or over-the counter or through ATMs which is placed on a payment account which you operate.

The crediting of interest to a payment account is not a service enabling cash to be placed on a payment account.

Q16. What is a payment account?

“Payment account” is defined in regulation 2 as “an account held in the name of one or more payment service users which is used for the execution of payment transactions”. When determining whether or not an account is a “payment account” for the purposes of the regulations, in our view it is appropriate to focus on its underlying purpose. To establish this it is necessary to consider a number of factors including:

- the purpose for which the account is designed and held out;
- the functionality of the account (the greater the scope for carrying out payment transactions on the account, the more likely it is to be a payment account);
- restrictive features relating to the account (for example, an account that has notice periods for withdrawals, or reduced interest rates if withdrawals are made, may be less likely to be a payment account);
- a limited ability to place and withdraw funds unless there is additional intervention or agreement from the payment service provider (this will tend to point more towards the account not being a payment account); and
- the extent to which customers use an account’s payment service functionality in practice.

Accordingly, in our view, “payment accounts” can include, for example, current accounts, e-money accounts, flexible savings accounts, credit card accounts and current account mortgages. On the other hand, in our view fixed term deposit accounts (where there are restrictions on the ability to make withdrawals), child trust fund deposit accounts and cash Individual Savings Accounts (ISAs) are not payment accounts.

We consider only the features of the account used for the purpose of making transactions, to which the regulations apply, fall within scope. For example, in the case of a current account mortgage, the mortgage element of the account would be out of scope, albeit that a mortgage payment from the current account would be subject to the regulations.

In our view, mortgage or loan accounts do not fall within the scope of the regulations. This is on the basis that the simple act of lending funds or receiving funds by way of repayment of that loan does not amount to provision of a payment service.

Q17. When might we be providing services enabling cash withdrawals from a payment account (paragraph 1(b))?

When you provide, for example, an ATM cash withdrawal or over the counter cash withdrawal service in relation to the payment accounts which you operate.

Q18. When might we be providing execution of (i) direct debits, including one-off direct debits, or (ii) payment transactions through a payment card or a similar device or (iii) credit transfers, including standing orders (paragraph 1(c))?

When you provide a service to clients enabling them to complete payment by way, for example, of direct debit, payment card (such as a debit card), electronic cheque or credit transfer (such as a standing order). Where these services are provided using a credit line though, you will be providing the service in paragraph 1(d).

In our view, the simple act of accepting payment by way of debit card or credit card for supply of your own goods or services does not generally amount to the provision of the service of execution of payment transactions through a payment card. For instance, where a restaurant accepts payment from a customer using his payment card it is not providing a payment service to the customer, but simply accepting payment for the price of the meal. It is merely a payment service user receiving payment from the customer. The firm providing

the merchant acquiring service enabling the restaurant to process the card transaction and receive payment is providing a payment service in this instance.

As regards a “direct debit”, regulation 2 defines this as meaning “a payment service for debiting the payer’s payment account where a payment transaction is initiated by the payee on the basis of consent given by the payer to the payee, to the payee’s payment service provider or to the payer’s own payment service provider”. As well as the likes of utility and other household bills, in our view this definition extends to a case where sender and recipient are the same person, for example where the person holds two bank accounts in two different banks.

Q19. When might we be providing execution of the following types of payment transaction where the funds are covered by a credit line for the payment user-

- (i) direct debits, including one-off direct debits,**
- (ii) payment transactions executed through a payment card or a similar device,**
- (iii) credit transfers, including standing orders (paragraph 1(d))?**

When you provide a service to clients enabling them to complete payment, for example, by way of direct debit using overdraft facilities, payment card such as deferred debit or credit card, electronic cheque using overdraft facilities or credit transfer (such as a standing order) using overdraft facilities.

Q20. When might we be issuing payment instruments (paragraph 1(e))?

A payment instrument is defined in regulation 2 and means any (a) personalised device or (b) personalised set of procedures agreed between the payment service user and the payment service provider, in both cases where used by the payment service user in order to initiate a payment order.

Examples of persons issuing payment instruments, for the purposes of Schedule 1 to the regulations, include credit card and debit card issuers and e-money issuers. In addition to the issue of physical instruments such as cards, arrangements by way of telephone call with password, or online instruction by which a payment order can be initiated could also amount to issuing payment instruments, depending on the service being provided.

We would not generally expect you to be issuing payment instruments (or providing other payment services) if all you do is issue direct debit mandates simply for the purpose of being paid for the goods or services you provide to your customers or clients. Nor if the payment transaction is initiated by paper, would that document be considered to be a payment instrument.

Q21. When might we be acquiring payment transactions (paragraph 1(e))?

If your business includes “merchant acquiring”. This will typically include providing services enabling suppliers of goods, services, accommodation or facilities to be paid for purchases arising from card scheme transactions.

Q22. When might we be providing money remittance services (paragraph 1(f))?

Money remittance is defined in regulation 2 as:

“... a service for the transmission of money (or any representation of monetary value), without any payment accounts being created in the name of the payer or payee, where-

- (a) funds are received from a payer for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee; or
- (b) funds are received on behalf of, and made available to, the payee”.

The service of money remittance cannot therefore involve the creation of payment accounts. Recital 7 of the PSD describes money remittance as “a simple payment service that is usually based on cash provided by a payer to a payment service provider, which remits the corresponding amount, for example, via communication network, to a payee or to another payment service provider acting on behalf of the payee”.

This service is likely therefore to be relevant, for example, to money transfer companies and hawala brokers.

Q23. We are a mobile network operator offering our client facilities to transfer funds – how do we tell whether and when the regulations apply to us (paragraph 1(g))?

You will be subject to the regulations if you provide a payment execution service to customers and:

- (i) customer consent to execute payment is provided by means of the mobile device you provide; and
- (ii) you receive payment for transmission to a supplier of goods and services, acting only as intermediary between the payment service user and supplier.

By contrast, when you add value to the good or service being purchased from a third party, you will not be acting only as an intermediary and hence will not be subject to the regulations (see PERG 15 Annex 3, paragraph (1)). Adding value may take the form of adding intrinsic value to goods or services supplied by a third party, for instance by providing access (including an SMS centre), search or distribution facilities. Nor will you be providing this service when a customer uses his mobile device merely as an authentication tool to execute payment from his bank account (for example, simply providing instructions to his bank via SMS), and does not transmit payment via you. Mobile phone top-ups also fall outside the scope of the regulations.

Q24 Do the same provisions apply to other types of telecommunications providers as they do to mobile network operators?

Yes, paragraph 1(g) and PERG 15 Annex 3(1) refer to payment transactions executed by means of any telecommunications, digital or IT device. These could include, for example, desktop and laptop computers, personal digital assistants and interactive television sets. Our guidance for mobile phone operators in relation to these provisions applies, by analogy, to other types of telecommunication provider.

Q25. We are a bill payment firm. Do the PSD regulations apply to us?

Not in our view where you receive payment on behalf of the payee so that your receipt constitutes settlement of the payer's debt to the payee. By contrast, if you provide a remittance service which does not involve receipt on behalf of the payee and corresponds to the definition of "money remittance" in regulation 2, you will be providing a money remittance service.

15.4 Small payment institutions, agents and exempt bodies

Q26. What criteria must we meet to be a “small payment institution”?

The conditions are set out in regulation 13 and include the following:

- the average of the preceding 12 months’ total amount of payment transactions executed by you, including your agents in the UK, does not exceed 3 million euros (or an equivalent amount) per month;
- none of the individuals responsible for the management or operation of your business has been convicted of offences relating to money laundering or terrorist financing, the *Act*, the PSD regulations or financial crimes;
- your head office, registered office or place of residence, as applicable, is in the UK; and
- you must comply with the registration requirements of the Money Laundering Regulations 2007, where they apply to you.

Q27. We satisfy the conditions for registration as a small payment institution – does that mean we have to register as one?

No, there are other options available to you. If you register as a small payment institution, you cannot acquire passport rights under the regulations, so you may wish to become an authorised payment institution if you wish to take advantage of the passport. You may also choose to become an agent of a payment services provider. An overview of the options available to you is set out in PERG 15 Annex 1, Flowcharts 1 and 2.

Q28. We only wish to be an agent of a payment institution. Do we need to apply to the FSA for registration?

No. If your principal is a payment institution, it is its responsibility to apply for registration on your behalf. Assuming your principal is not an EEA firm, you are required to be registered on the FSA register before you provide payment services, subject to any relevant transitional provisions (see PERG 15.7) which may delay or avoid the need for registration. If your principal is an EEA firm, your principal will need to comply with the relevant Home State legislation relating to your appointment.

Q29. We are an agent of a credit institution for the purpose of providing payment services. Do we need to apply to the FSA for registration?

No. If you are such an agent of a credit institution which is permitted to provide payment services in the UK, you are not required to be registered under the PSD regulations. A credit institution will be permitted to provide payment services if it has a Part IV permission to accept deposits, or if it is an EEA credit institution exercising passport rights under paragraph 4 of the Annex to the Banking Consolidation directive.

Q30. We are an agent of an e-money issuer for the purpose of providing payment services. Do we need to apply to the FSA for registration?

No. If you are such an agent of an e-money issuer which is permitted to provide payment services in the UK, you are not required to be registered under the PSD regulations. An e-money issuer will be permitted to provide payment services if it has a Part IV permission to issue e-money, or if it is either an EEA e-money issuer exercising passport rights or a *small e-money issuer*.

Q31. We are a credit union. Are we exempt from the regulations?

Yes. You are exempt from the regulations by virtue of regulation 3.

Q32. We are a municipal bank. Are we exempt from the regulations?

Yes. You are exempt from the regulations (together with credit unions and the National Savings Bank), by virtue of regulation 3. Unlike credit unions, you are required to notify us if you wish to provide payment services, although you only need to do this once.

15.5 Negative scope/exclusions

Schedule 1 Part 2 to the regulations contains a list of activities which do not constitute payment services. The following questions only deal with a selection of these. You should consult Annex 3 to this chapter for a full list of provisions, if you require more details.

Q33. Our business consists of cash payments directly from or to our customers – do the regulations apply to us?

No. The regulations do not apply to payment transactions made in cash, without the intervention of an intermediary (see PERG 15 Annex 3, paragraph (a)).

Q34. We are a charity which collects cash donations and transmits funds via bank transfer to the intended recipients – do the regulations apply to us?

No. The regulations do not apply to payment transactions consisting of non-professional cash collection and delivery as part of a not-for-profit or charitable activity (see PERG 15, Annex 3, paragraph (d)).

Q35. We provide a “cashback” service to our customers when they pay for their goods at the checkout – do the regulations apply to us?

No. The regulations do not apply to cashback services (see PERG 15, Annex 3, paragraph (e)).

Q36. We are a bureau de change providing cash only forex services and our clients do not have accounts with us – are these services outside the scope of the regulations?

Yes. The regulations do not apply to money exchange business consisting of cash-to-cash operations where the funds are not held on a payment account (see PERG 15, Annex 3, paragraph (f)). If you allow a customer to pay for foreign currency using a payment card, this does not mean that you will be providing a payment service. The regulations will though apply to the payment transaction made using the payment card and the payment service provided to you by the merchant acquirer. In other words, the regulations apply to the merchant acquirer's services but yours remain outside the scope of authorisation or registration.

The regulations do not affect your obligations under the Money Laundering Regulations 2007.

Q37. Do the regulations distinguish between (i) payment transactions between payment service providers and (ii) payment services provided to clients?

Yes, broadly the object of the regulations is the payment service provided to specific clients and not the dealings among payment service providers to deliver the end payment arising from that service. A payment transaction may involve a chain of payment service providers. Where a bank, for example, provides a cash withdrawal or execution of payment transaction service to its customer which involves the use of a clearing bank, it will still be providing a payment service to its customer.

The regulations do not though cover inter-bank settlement. More specifically, the regulations do not apply to payment transactions carried on within a payment or securities settlement system between payment service providers and settlement agents, central counterparties, clearing houses, central banks or other participants in the system (see PERG 15 Annex 3, paragraph (h)).

Q38. We are an *investment firm* providing investment services to our clients – are payment transactions relating to these services caught by the regulations?

Generally, no. Where payment transactions only arise in connection with your main activity of providing investment services, in our view it is unlikely that you will be providing payment services by way of business. In those limited cases where you are, the regulations do not apply to securities assets servicing, including dividends, income or other distributions and redemption or sale (see PERG 15 Annex 3, paragraph (i)).

Q39. We are a firm simply providing IT support in connection with payment system infrastructures – are these services subject to the regulations?

No. There is an exclusion for technical service providers which simply provide IT support for the provision of payment services (see PERG 15 Annex 3, paragraph (j)). Other services excluded from the regulations include data processing, storage and authentication.

Q40. Which types of payment card could fall within the so-called “limited network” exclusion (see PERG 15, Annex 3, paragraph (k))?

The “limited network” exclusion forms part of a broader exclusion which applies to services based on instruments that can be used to acquire goods or services only-

- (a) in or on the instrument issuer's premises; or
- (b) under a commercial agreement with the issuer, either within a limited network of service providers or for a limited range of goods or services ...”.

As regards (a), examples of excluded instruments could include:

- (1) staff catering cards – reloadable cards for use in the employer's canteen or restaurant;
- (2) tour operator cards – issued for use only within the tour operator's holiday village or other premises (for example, to pay for meals, drinks and sports activities);
- (3) store cards – where the card can only be used at the store's premises (so where a store card is co-branded with a third party debit card or credit card issuer and can be used as a debit card or credit card outside the store, it will still fall within the regulations).

As regards (b), this exclusion has two discrete limbs and so applies either to instruments that can be used only:

- (i) within a limited network of service providers; or
- (ii) for a limited range of goods or services.

In our view, examples of excluded instruments falling within (b) include:

- (1) transport cards – where these are used only for purchasing travel tickets (for example, the Oyster card which provides access to different service providers within the London public transport system);
- (2) petrol cards (including pan-European cards) – where these are issued for use at a specified chain of petrol stations and forecourts at these stations;
- (3) membership cards – where a card can only be used to pay for goods or services offered by a specific club or organisation;
- (4) store card – where the card can be used at a specified chain of stores at their premises or on their website.

Instruments for the purpose of this exclusion can include, for example, vouchers and other devices.

Q41. Do the regulations specify or define what a “limited network” is for these purposes?

Neither the PSD nor consequently the PSD regulations provide any definition, conditions or criteria for determining what is a “limited network of service providers”. The issue of whether or not a “limited network” is in existence is ultimately a question of judgement that, in our view, should take account of various factors (none of which is likely to be conclusive in itself). These include the number of service providers involved, the scale of the services provided, whether membership of the network is open-ended, the number of clients using the network and the nature of the services being offered.

While a “limited network” could include transport cards, petrol cards, membership cards and store cards, we would not generally expect “city cards” to fall within this exclusion, to the extent that these tend to provide users with access to a broad range of goods and services offered by a city’s shops and businesses.

Q42. We are a payment services provider which carries out payment transactions for our own account – are these payment transactions excluded from the scope of the regulations?

Yes. Payment transactions carried out between payment service providers, or their agents or branches, for their own account, are all excluded from the scope of the regulations (see PERG 15 Annex 3, paragraph (m)). This would include, for example, electronic payment from one payment services provider to another, in discharge of a debt owed by one to the other.

Q43. We are a company which performs a group treasury function, including providing payment services directly to other group companies – are these intra-group payment services excluded from the regulations?

Yes. Intra-group payment transactions are excluded from the regulations, where payment is made direct from one group company to another (see PERG 15 Annex 3, paragraph (n)). This includes the case where the group company providing the payment service is, itself, a payment service provider otherwise subject to the regulations.

Q44. We are an independent ATM deployer offering cash dispensing facilities to users. We are not a bank. Are we subject to the regulations?

No, assuming you do not provide other payment services listed in Schedule 1 Part 1 to the regulations (see PERG 15 Annex 3, paragraph (o)). If other payment services are provided, all your payment services (including the ATM cash dispensing facilities) will be subject to the regulations, to the extent that other exclusions are inapplicable.

15.6 Territorial scope

Q45. We are a UK payment institution – when will we need to make a passport notification?

You will need to make a notification if you intend to exercise passport rights either for the purposes of:

- establishment (for example, setting up a branch in another EEA State); or
- providing services in another EEA State.

As to the circumstances in which you may need to exercise these rights, this gives rise to issues of interpretation both under the PSD regulations and the local law of the EEA State in which you wish to do business. Our guidance below relates only to the PSD regulations and may differ from the approach in other EEA States. We cannot give guidance on the local law of other EEA States and you may therefore wish to take professional advice if you think your business is likely to be affected by these issues (for instance, if you are soliciting clients in other EEA States).

As regards the provision of payment services in other EEA States and passport notification, in our view the Commission Interpretative Communication (Freedom to provide services and the interest of the general good in the Second Banking Directive (97C 209/04)) provides a useful starting point, in particular because payment services form part of the BCD passport. On this basis, we would identify the following factors as being relevant to whether you need to make a passport notification.

Factors indicating the provision of payment services in another EEA State and the need for passport notification

- (i) The establishment of a physical presence (for example, offices) in another EEA State, for use by you, triggers the need for a branch notification.
- (ii) The appointment of an agent established in another EEA State is likely to amount to an exercise of a right of establishment where the agent (a) has a permanent mandate in relation to payment services, (b) is subject to your management and control and (c) is able to provide payment services on your behalf.

- (iii) The installation of an ATM in another EEA State, where the ATM is your only presence in that other EEA State, gives rise to the need for a services (and not an establishment) notification.

Actions which are not sufficient alone to constitute cross-border services into another EEA State and the need for passport notification

- (i) The act of executing direct debits/standing orders/credit transfers from the UK where the payee is located in another EEA State.
- (ii) The act of remitting money from the UK to a payee in another EEA State.
- (iii) The act of executing a payment transaction to a payee located in another EEA State upon receipt of an instruction from the payer received by e-mail, text, or other electronic means (for example, internet banking).
- (iv) Where you provide an execution service enabling your credit or debit cardholders to use their credit card/debit card within the territory of another EEA State, for example for the purposes of a hotel bill (see the services in PERG 15 Annex 2, paragraphs (c) and (d)).

Q46. We are a non-EEA payment institution providing payment services to UK customers from a location outside the EEA. Do we require authorisation or registration under the regulations?

No. When considering whether you fall within the scope of the regulations, our starting point is to consider whether a UK payment services provider would be providing cross-border services in analogous circumstances (for example, when it provides payment services to EEA customers from a location in the UK).

Accordingly, we would not generally expect a payment services provider incorporated and located outside the EEA to be within the scope of the regulations, if all it does is to provide internet-based and other services to UK customers from that location.

A non-EEA payment institution for these purposes would include firms incorporated in the Isle of Man or Channel Islands, both of which are outside the scope of the Payment Services Directive.

15.7 Transitional arrangements

Q47. We are a UK payment institution wishing to become an authorised payment institution – do we need to have applied for authorisation prior to 1 November 2009?

Not necessarily. Provided that you:

- are a body corporate; and
- lawfully provided payment services in the UK before 25 December 2007

you (and your UK agents including those appointed after 25 December 2007) can continue to provide those same payment services until 1 May 2011 (see regulation 122), without being either authorised or registered as an agent.

Your rights under the transitional arrangements in regulation 122 do not extend to passport rights. If you wish to exercise passport rights as a payment institution, you will first need to have applied for and been granted authorisation.

If you are also a “financial institution”, you may be able to take advantage of the separate transitional arrangements for these bodies. If you do so, the transitional arrangements under regulation 122 will not apply to you.

Q48. We are a UK financial institution to which the regulations apply – do we need to have applied for authorisation or registration prior to 1 November 2009?

Not necessarily. From 1 November 2009 to 25 December 2009, you will be deemed to be an authorised payment institution provided that you:

- were carrying on payment services prior to 25 December 2007; and
- met the conditions in article 24(1)(e) BCD (so your parent undertaking will need to be subject to consolidated supervision).

If you wish to continue being deemed to be authorised after 25 December 2009, you will need to have submitted the requisite information to us before 25 December 2009, in accordance with regulation 121(2), before 25 December 2009. This comprises information in relation to Schedule 2 paragraphs 1, 4, 7 to 9 and 12 to the regulations, including your programme of operations, procedures relating to safeguarding of funds, controllers and evidence of good repute and competence of directors and management. If we are satisfied

that you meet the required conditions in relation to these matters, you will be deemed to be an authorised payment institution and able to make passport notifications without the need to apply separately for authorisation.

An overview of the position of financial institutions and the transitional provisions in the PSD regulations is set out in PERG 15 Annex 1, Flowchart 2.

Q49. We are a UK payment institution which meets the conditions to be a “small payment institution” – do we need to have applied for registration prior to 1 November 2009?

Not necessarily. Provided that you were lawfully providing payment services in the UK before 25 December 2007 you do not need to be registered as a small payment institution, until 25 December 2010 (see regulation 123).

If you are also a “financial institution”, you may be able to take advantage of the separate transitional arrangements for these bodies. Likewise, you may be able to take advantage of the transitional arrangements in regulation 122 (see Q47). If you qualify for the transitional arrangements for financial institutions or those in regulation 122, you will not fall within the transitional regime for small payment institutions under regulation 123.

An overview of the position of small payment institutions under the transitional provisions in the PSD regulations is set out in PERG 15 Annex 1, Flowchart 2.

Q50. Is there a transitional regime in relation to conduct of business requirements under the regulations?

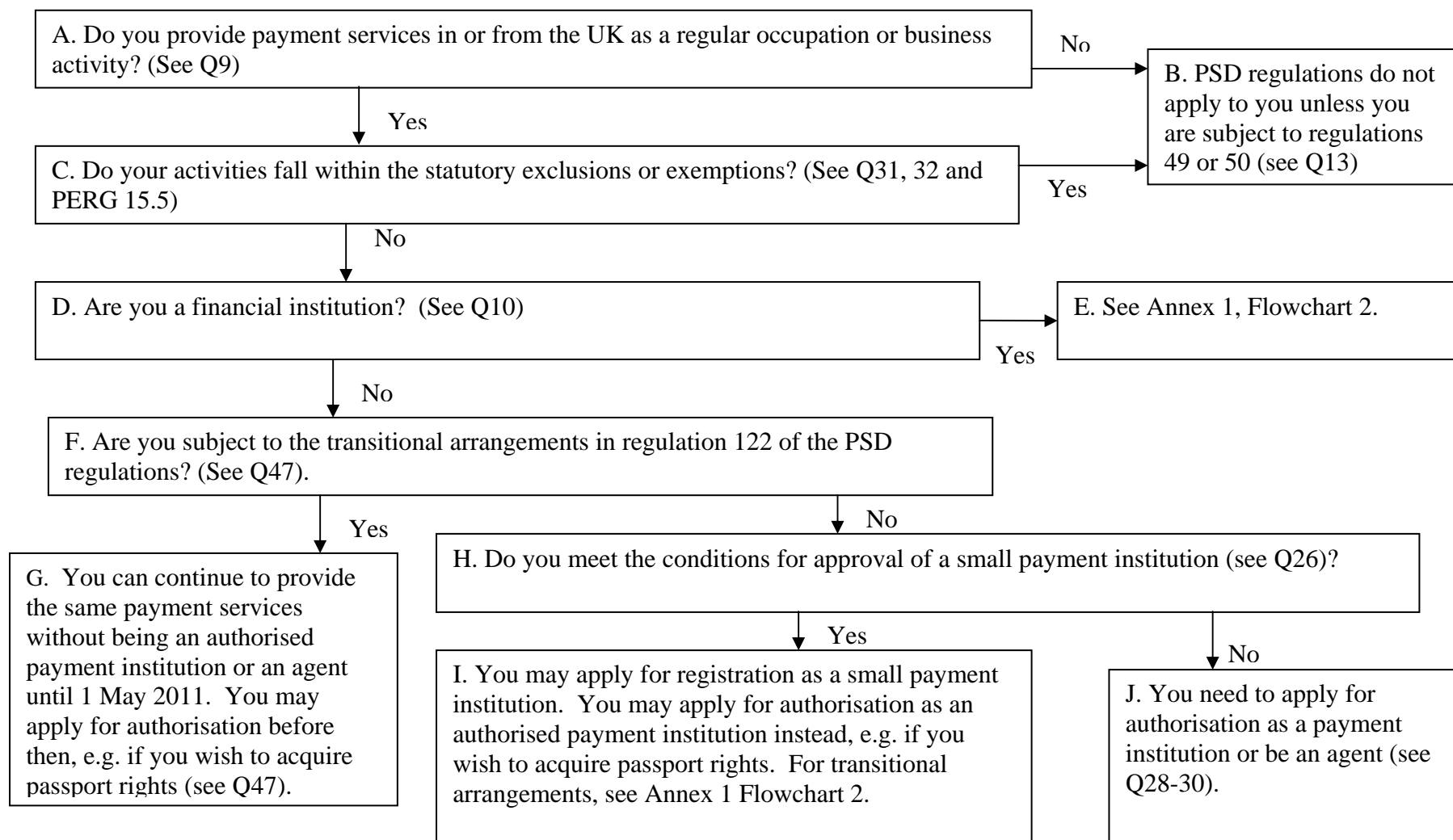
No. The conduct of business requirements under the regulations will apply from 1 November 2009.

ANNEX 1

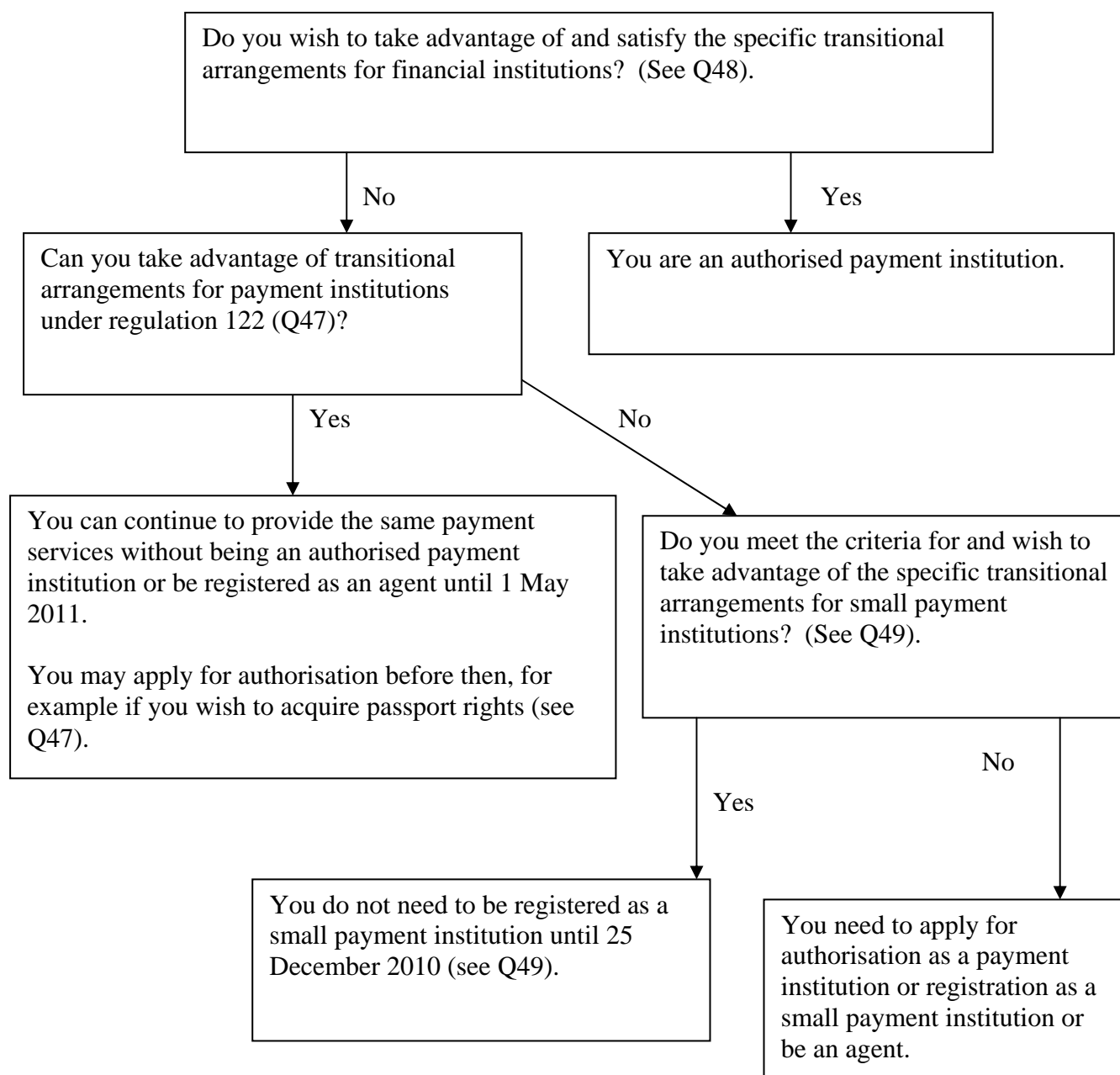
Annex 1 provides an overview, using flowcharts, of the application of the PSD regulations to payment institutions. It does not apply to other payment services providers including *credit institutions*, *e-money issuers* or the Post Office Limited.

ANNEX 1

Flowchart 1 – Payment institutions established in the UK – do the PSD regulations apply to us?



Flowchart 2 – PSD transitional arrangements



ANNEX 2**Payment Services in Schedule 1 Part 1 to the PSD regulations**

- (a) Services enabling cash to be placed on a payment account and all of the operations required for operating a payment account
- (b) Services enabling cash withdrawals from a payment account and all of the operations required for operating a payment account
- (c) The execution of the following types of payment transaction –
 - (i) direct debits, including one-off direct debits;
 - (ii) payment transactions through a payment card or a similar device;
 - (iii) credit transfers, including standing orders
- (d) The execution of the following types of payment transaction where the funds are covered by a credit line for the payment user-
 - (i) direct debits, including one-off direct debits;
 - (ii) payment transactions executed through a payment card or a similar device;
 - (iii) credit transfers, including standing orders
- (e) Issuing payment instruments or acquiring payment transactions
- (f) Money remittance
- (g) The execution of payment transactions where the consent of the payer to execute the payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator acting only as an intermediary between the payment user and the supplier of the goods or services

ANNEX 3**Schedule 1 Part 2 to the PSD regulations: Activities which do not constitute payment services**

- (a) Payment transactions executed wholly in cash and directly between the payer and the payee, without any intermediary intervention.
- (b) Payment transactions between the payer and the payee through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee.
- (c) The professional physical transport of banknotes and coins, including their collection, processing and delivery.
- (d) Payment transactions consisting of non-professional cash collection and delivery as part of a not-for-profit or charitable activity.
- (e) Services where cash is provided by the payee to the payer as part of a payment transaction for the purchase of goods or services following an explicit request by the payer immediately before the execution of the payment transaction.
- (f) Money exchange business consisting of cash-to-cash operations where the funds are not held on a payment account.
- (g) Payment transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee—
 - (i) paper cheques of any kind, including travellers' cheques;
 - (ii) bankers' drafts;
 - (iii) paper-based vouchers;
 - (iv) paper postal orders.
- (h) Payment transactions carried out within a payment or securities settlement system between payment services providers and settlement agents, central counterparties, clearing houses, central banks or other participants in the system.
- (i) Payment transactions related to securities asset servicing, including dividends, income or other distributions, or redemption or sale, carried out by persons referred to in subparagraph (h) or by investment firms, credit institutions, collective investment

undertakings or asset management companies providing investment services or by any other entities allowed to have the custody of financial instruments.

- (j) Services provided by technical service providers, which support the provision of payment services, without the provider entering at any time into possession of the funds to be transferred, including—
 - (i) the processing and storage of data;
 - (ii) trust and privacy protection services;
 - (iii) data and entity authentication;
 - (iv) information technology;
 - (v) communication network provision; and
 - (vi) the provision and maintenance of terminals and devices used for payment services.
- (k) Services based on instruments that can be used to acquire goods or services only—
 - (i) in or on the issuer’s premises; or
 - (ii) under a commercial agreement with the issuer, either within a limited network of service providers or for a limited range of goods or services,
 and for these purposes the “issuer” is the person who issues the instrument in question.
- (l) Payment transactions executed by means of any telecommunication, digital or IT device, where the goods or services purchased are delivered to and are to be used through a telecommunication, digital or IT device, provided that the telecommunication, digital or IT operator does not act only as an intermediary between the payment service user and the supplier of the goods and services.
- (m) Payment transactions carried out between payment service providers, or their agents or branches, for their own account.
- (n) Payment transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking, without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group.
- (o) Services by providers to withdraw cash by means of automated teller machines acting on behalf of one or more card issuers, which are not party to the framework contract

with the customer withdrawing money from a payment account, where no other payment service is conducted by the provider.