

EXPLANATORY MEMORANDUM TO
THE BANKING ACT 2009 (SERVICE PROVIDERS TO PAYMENT SYSTEMS)
ORDER 2017

2017 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument will allow service providers to systemically important payment systems to be supervised by the Bank of England, if recognised by HM Treasury. The Bank already has powers to supervise systemically important payment systems recognised by HM Treasury in order to manage the systemic risks that they could pose to UK financial stability, but not those firms providing services (e.g. infrastructure) to them. In some cases, service providers are crucial to the functioning of major UK payment systems. This amendment is intended to close the gap in the Bank's oversight of systemically important systems.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments

- 3.1 None

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 Part 2 of the instrument amends Part 5 of the Banking Act 2009, as provided for in section 206A, to enable service providers to systemically important payment systems to be supervised by the Bank.
- 4.2 The instrument does not automatically bring any service providers into scope of supervision. HM Treasury would need to 'specify' the service provider by including it in the recognition order of the recognised payment system to which services are provided, as provided for in section 206A. This statutory instrument therefore paves the way for the making of orders to bring service providers under Bank supervision.
- 4.3 The amendments in Part 2 also include some minor amendments to Part 5 of the 2009 Act to include the Payment Systems Regulator in procedural provisions alongside other financial regulators, in consequence of the establishment of the Payment Systems Regulator under the Financial Services (Banking Reform) Act 2013. Part 5 of the Banking Act 2009 has also recently been amended by the Digital Economy Act 2017, to widen the scope of the payment systems which may be specified by HM Treasury for supervision by the Bank of England.

- 4.4 This instrument also makes amendments in two other areas relating to payment systems. Part 3 adds the Payment Systems Regulator to the bodies to which the Bank of England is permitted to disclose information under the Bank of England Act 1998. Part 4 makes amendments to the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 (made under the Financial Services and Markets Act 2000) to retain unchanged the effect of that Order following the amendments to the Banking Act 2009 made by the Digital Economy Act 2017.

5. Extent and Territorial Application

- 5.1 This instrument extends to all of the United Kingdom.
- 5.2 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Economic Secretary to the Treasury, Stephen Barclay MP, has made the following statement regarding Human Rights:
- 6.2 “In my view the provisions of the Banking Act 2009 (Service Providers to Payment Systems) Order 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 Payment systems enable the movement of money around the economy by clearing funds before they are settled in the Bank of England. They are vital to the UK’s financial system and process in the region of 21 billion transactions worth around £75 trillion a year.
- 7.2 Part 5 of the Banking Act 2009 gave the Bank of England formal powers of oversight of inter-bank payment systems specified by HM Treasury in a “recognition order”, with the aim of promoting the robustness and resilience of key UK payment systems. This allows the Bank to directly request information and assurance from the operators of the recognised payment systems, and to issue directions or impose regulatory requirements on the operators where necessary and appropriate. The scope of Part 5 was extended to all payment systems by the Digital Economy Act 2017.
- 7.3 The Banking Act 2009 did not confer the same powers with regard to service providers to payment systems, but did provide for the option for the Government to amend the Act to allow for this supervision.
- 7.4 This instrument does this, and allows the Bank to supervise service providers to recognised payment systems, closing a gap in the Bank of England’s oversight of systems where disruption could have serious consequences for the UK’s economy or financial stability.
- 7.5 A service provider in this context may be an organisation that designs, builds or operates a payment system’s infrastructure, or may be a telecommunication or information technology firm that provides crucial services to that payment system. An example of a service provider to payment systems operating in the UK is VocaLink, which provides the infrastructure for the Bacs, Faster Payments and LINK payment systems. A service provider to a payment system is, essentially, a person or firm that provides services that form part of the arrangements constituting that payment system.

- 7.6 If a service provider was specified for supervision by the Bank, the controls the Bank would have in relation to that service provider are the same as the controls that they currently have for recognised payment systems: the Bank could directly request information from that service provider, issue directions, and impose regulatory requirements on it where necessary and appropriate. Examples of this from recognised payment systems space are mandating the internationally agreed 'Principles for Financial Market Infrastructure' as principles that all payment systems must have regards to; publishing a code of practice on governance and requiring independent reports.
- 7.7 This instrument does not automatically bring any service providers into scope of supervision by the Bank. HM Treasury would need to 'specify' the service provider by including it in the recognition order of the recognised payment system to which services are provided.
- 7.8 HM Treasury would specify a service provider to a recognised payment system if they believed supervision of the system to be crucial to financial stability in the UK. Only service providers that are considered systemically important to UK financial stability would be considered for supervision.
- 7.9 HM Treasury would consider the Bank of England's recommendations regarding the supervision of service providers. The Bank would recommend a service provider for recognition to HM Treasury if it deemed that supervision of that service provider was important to protect and enhance financial stability; for example, if they deemed that the service provider provided critical services to a payment system which itself was systemically important (and therefore supervised by the Bank).
- 7.10 The Department's primary objective in allowing the Bank direct supervision of key service providers is to prevent system outages that would have serious consequences for service users and, as a result, for UK financial stability. Given this, legislating to achieve these outcomes is the only option.
- 7.11 The instrument also allows the Bank of England to disclose information obtained under the Bank of England Act 1998 to the Payment Systems Regulator, in order to assist the Payment Systems Regulator in discharging its functions more effectively.

Consolidation

- 7.12 HM Treasury does not currently intend to consolidate any of the legislation amended by this instrument.

8. Consultation outcome

- 8.1 HM Treasury has consulted the Bank of England, Prudential Regulation Authority and Financial Conduct Authority as required by the Bank of England Act 1998 and the Banking Act 2009, and worked with those regulators and the Payment Systems Regulator in the preparation of the instrument. The amendments do not require a formal public consultation. HM Treasury has held informal consultation with industry, which was broadly supportive.
- 8.2 The services providers that the measure may impact are expecting the legislation. HM Treasury has been in discussion with these service providers, and they have not raised any concerns.

9. Guidance

- 9.1 HM Treasury does not intend to publish guidance on this instrument. This instrument does not require industry to change behaviour. The Bank of England may provide guidance for recognised firms.

10. Impact

- 10.1 The measure will safeguard the stability of the UK's recognised payment systems. In order to ensure that the infrastructure of the UK's payment systems is robust and effective, HM Treasury needs to be able to recognise systemically important service providers for supervision by the Bank.
- 10.2 This would allow the Bank to identify and require the adequate management of risks posed to and by specified service providers, with a view to ensuring the continued smooth operation of systemically important payment systems.
- 10.3 The provision does not have any direct financial costs to business, charities, or voluntary bodies. A further Treasury order would be required to specify a service provider for Bank of England supervision.
- 10.4 The direct supervision of specified service providers will, amongst other things, allow the Bank to directly request information from them, and to issue directions or impose regulatory requirements on the provider of the service (not just the procurer of the service) where necessary and appropriate.
- 10.5 HM Treasury has made an assessment of what the costs to a service provider would be were they to be specified for Bank supervision. We assess that all ongoing costs for a supervised service provider would amount to less than £1million in total, therefore an impact assessment is not required.
- 10.6 Were HM Treasury to specify a service provider for supervision, the costs to that service provider would vary firm by firm:
- 10.7 Ongoing costs may include the staff and management time required to meet the Bank's supervisory expectations, the cost of meeting any standards set by the Bank and the ability of the Bank to exercise certain powers to gather information, the use of which will necessarily vary firm-by-firm.
- 10.8 This instrument has no impact on the public sector. Were HM Treasury to specify a service provider for supervision there would be a small impact on the Bank of England, but since HM Treasury is only able to specify service providers to payment systems which are supervised by the Bank of England, such impact would not be significant.

11. Regulating small business

- 11.1 It is unlikely that legislation would apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 HM Treasury, in discussion with the Bank of England, will monitor and review the effectiveness of Part 5 of the Banking Act 2009 in enabling the Bank of England oversight of payment systems that are systemically important to the UK's economy to promote robustness and resilience of these systems. Where HM Treasury considers it

appropriate, it may make an order to specify service providers to systemically important payment systems for oversight by the Bank.

12.2 The Economic Secretary to the Treasury, Stephen Barclay MP, has made the following statement regarding the appropriateness of a legislative provision for review of this instrument:

12.3 “It is not appropriate to make legislative provision for review of the Banking Act 2009 (Service Providers to Payment Systems) Order 2017. The Order does not itself impose any requirements, restrictions, conditions or standards in relation to business activity. It extends the scope of a supervisory regime in primary legislation, and the power under which it is made does not provide for that extension of scope to be reversed. It is more appropriate to review the effect of the supervisory regime through review of Part 5 of the Banking Act 2009 as a whole together with Treasury orders made under that Part which specify the businesses to be supervised.”

13. Contact

13.1 Georgie Williams at HM Treasury Telephone: 020 7270 4915 or email: Georgie.williams@hmtreasury.gov.uk can answer any queries regarding the instrument.