
DRAFT STATUTORY INSTRUMENTS

2018 No.

The Electronic Presentment of Instruments (Evidence of Payment and Compensation for Loss) Regulations 2018

PART 3

Compensation for loss

Responsible banker to compensate eligible claimants

5.—(1) Subject to the following provisions of this Part, a responsible banker⁽¹⁾ must compensate a person (“the claimant”) for loss incurred by the claimant if—

- (a) the claimant incurred the loss in connection with electronic presentment or purported electronic presentment of an instrument⁽²⁾,
- (b) the claimant is—
 - (i) the customer of the banker which has paid the instrument, from whose account the payment was debited, or
 - (ii) the banker which paid the instrument,
- (c) the loss resulted wholly or in part from a factor other than—
 - (i) gross negligence⁽³⁾ on the part of the claimant, or
 - (ii) fraudulent activity in which the claimant was knowingly involved,
- (d) the claimant has notified a banker in accordance with regulation 6(1) and made a claim in accordance with regulation 6(3) and (4), and
- (e) one of the criteria in paragraph (2) is met.

(2) The criteria are—

- (a) the electronic presentment or purported electronic presentment of the instrument was of a type described in section 89E(2)(c), (d) or (e) of the Bills of Exchange Act 1882;
- (b) the instrument was collected for or paid to a person other than the true owner of the instrument.

(3) Paragraph (1) applies irrespective of fault for the loss incurred by the claimant (but regulation 8 makes provision for the reduction in the amount of compensation to be paid in certain circumstances).

(4) In this regulation, references to “loss” are to loss arising directly from the debiting of funds from the claimant’s account and do not include any further loss arising in consequence thereof.

(1) Section 89E(3) of the Bills of Exchange Act 1882 makes provision about the meaning of “responsible banker”.
(2) Section 89E(2) of the Bills of Exchange Act 1882 makes provision about the meaning of “electronic presentment or purported electronic presentment of an instrument”.
(3) The phrase “gross negligence” is also used in regulations 75 and 77 of the Payment Services Regulations 2017 (S.I. 2017/752). The Payment Services Regulations 2017 transposed in part Directive 2015/2366/EU of the European Parliament and of the Council of 25th November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC (OJ L 337 23.12.2015, p.35).

Procedure for making and determining claims

- 6.—(1) Before making a claim for compensation under this Part—
- (a) where the claimant is the customer of the banker which paid the instrument, and from whose account the payment was debited, the claimant must notify that banker in writing of the loss to which the claim relates;
 - (b) where the claimant is the banker which paid the instrument, the claimant must notify the responsible banker in writing of the loss to which the claim relates.
- (2) Where the banker which paid the instrument has been notified in accordance with paragraph (1)(a), that banker must notify the responsible banker in writing of that notification before the end of the period of 5 working days starting on the first working day after the banker received the notification.
- (3) A claim for compensation under this Part must—
- (a) be made to the responsible banker in writing, and
 - (b) include all information relating to the claim necessary for the responsible banker to assess whether the conditions in regulation 5 have been met.
- (4) A claim for compensation under this Part—
- (a) may be made only if—
 - (i) the period of 56 days beginning with the day after the day on which the claimant notified the loss in accordance with paragraph (1) has expired, and
 - (ii) compensation for the total loss to which the claim relates has not been paid to the claimant, whether under another scheme or otherwise, and
 - (b) must be made before the end of the period of 6 years beginning with the day after the day on which the loss was incurred.
- (5) Subject to paragraph (7), the responsible banker must before the end of the period of 15 working days beginning with the first working day after the day on which the responsible banker receives a claim for compensation under this Part, send to the claimant in writing—
- (a) acceptance of the claim, and confirmation of—
 - (i) the amount that has been paid in respect of the claim, or
 - (ii) the amount that will be paid in respect of the claim and the date by which such amount will be paid, which must be before the end of the period of 10 working days beginning with the first working day after the day on which the acceptance is sent,
 - (b) refusal of the claim and the reason for the refusal, or
 - (c) a request for further information to enable the responsible banker to assess the claim.
- (6) If the responsible banker requests further information under paragraph (5)(c), the responsible banker must in any event send the claimant an acceptance or refusal of the claim as described in paragraph (5)(a) or (b) within the period of 120 days beginning with the day after that on which the responsible banker received the claim.
- (7) The responsible banker is not required to give a notification of refusal in accordance with paragraph (5)(b) if—
- (a) the responsible banker has reasonable grounds to suspect fraudulent activity in which the claimant was knowingly involved,
 - (b) the responsible banker has notified the appropriate authority of such suspected fraudulent activity and grounds, and

- (c) the responsible banker considers that giving a notification in accordance with paragraph (5)(b) would be likely to prejudice any investigation into the suspected fraudulent activity.

Protection of potential claimant by section 80 of the Bills of Exchange Act 1882

7. Regulation 5 does not require the responsible banker to compensate the claimant if the claimant is entitled to the same rights, and is placed in the same position, as if payment of the instrument had been made to the true owner thereof pursuant to section 80 of the Bills of Exchange Act 1882 (protection to banker and drawer where cheque is crossed).

Contributory behaviour by the claimant

8. Where a claimant incurs a loss in respect of which a responsible banker is liable to pay compensation under regulation 5, and that loss results wholly or in part from an act or omission of the claimant, the amount of the compensation to be paid by the responsible banker to the claimant is reduced in proportion to the contribution of such act or omission to the loss.

Action for damages

9. A failure by a banker to pay the full amount of compensation to be paid to a claimant under this Part is actionable at the suit of the claimant, subject to the defences and other incidents applying to actions for breach of statutory duty.

Review

10.—(1) The Treasury must from time to time—

- (a) carry out a review of the regulatory provision contained in these Regulations, and
- (b) publish a report setting out the conclusions of the review.

(2) The first report must be published before the end of the period of five years beginning with the date on which these Regulations come into force.

(3) Subsequent reports must be published at intervals not exceeding 5 years.

(4) Section 30(4) of the Small Business, Enterprise and Employment Act 2015(4) requires that a report published under this regulation must, in particular—

- (a) set out the objectives intended to be achieved by the regulatory provision referred to in paragraph (1)(a),
- (b) assess the extent to which those objectives are achieved,
- (c) assess whether those objectives remain appropriate, and
- (d) if those objectives remain appropriate, assess the extent to which they could be achieved in another way which involves less onerous regulatory provision.

(5) In this regulation, “regulatory provision” has the same meaning as in sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 (see section 32 of that Act).