

EXPLANATORY MEMORANDUM TO
THE PAYMENT SYSTEMS AND SERVICES AND ELECTRONIC MONEY
(MISCELLANEOUS AMENDMENTS) REGULATIONS 2017

2017 No. 1173

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 Statutory Instrument (SI) makes amendments to other SIs. These changes will support non-bank payment institutions in directly accessing UK payment systems, make minor amendments to the legislation implementing the second Payment Services Directive (PSDII) and the second Electronic Money Directive (EMDII), and make consequential changes to other legislation reflecting a recent change to the Banking Act 2009 which allowed the Bank of England to oversee all, not just inter-bank, payment systems.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This instrument contains a number of different provisions with a common theme of payments.
- 4.2 Part 2 exercises a power inserted into the Financial Services and Markets Act 2000 by the Digital Economy Act 2017, and supplements the implementing legislation for the Settlement Finality Directive (Directive 98/26/EC) such that it applies to non-bank payment institutions as well as to those entities to which that Directive applies. It does not make provision to implement that Directive.
- 4.3 Part 3 makes minor amendments relating to the implementation of the revised Payment Services Directive (Directive (EU) 2015/2366) and the second Electronic Money Directive (Directive 2009/110/EC). These amendments are made to ensure a coherent implementation in UK legislation, but do not in themselves make new provision to implement any element of the Directives which was not already implemented.
- 4.4 Part 4 makes consequential amendments to an instrument made under the Banking Act 2009 in order to reflect amendments to that Act 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 The instrument applies to all of the United Kingdom

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

Changes to the Financial Markets and Insolvency (Settlement Finality) Regulations 1999:

7.1 This instrument exercises a power inserted into the Financial Services and Markets Act 2000 by the Digital Economy Act 2017.

7.2 This will enable non-bank payment institutions to be covered by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, a pre-requisite to directly accessing the key UK payment systems which are designated under those Regulations.

7.3 The Regulations provide for transfer orders in designated payment systems to be settled in the event of the insolvency of a participant in the system, and therefore protect the system against a failure of settlement between participants when one participant becomes insolvent. The amendment provides for non-bank payment institutions to be treated as participants in designated payment systems.

7.4 This represents the final legislative provision (in addition to provisions in the Digital Economy Act 2017 and the Payment Services Regulations 2017) to support the Bank of England in opening up direct access to payment systems to non-bank payment institutions, which has previously been the domain of banks. This will not compel payment institutions to become members, or compel a payment system to allow them to become members, but it removes an existing barrier to direct access.

Changes relating to the second Payment Services Directive (PSDII) and the second Electronic Money Directive (EMDII):

7.5 The Electronic Money Regulations 2011 (EMRs) and Payment Services Regulations 2017 (PSRs) will, from January 2018, permit e-money firms and payment institutions to protect customer funds via both an insurance policy and a separate ‘safeguarding account’ which holds funds ringfenced for customers.

7.6 Under the Regulations, an insurance policy pay-out cannot be put into the safeguarding account holding customer funds, despite both sets of funds being solely for customers. This instrument will allow these insurance policies to pay out into an existing safeguarding account, rather than requiring a separate account.

7.7 Under the PSRs registered account information service providers (raISPs – who provide new ‘Open Banking’ type account information services) will not be prohibited from using agents, but the PSRs do not provide for the Financial Conduct Authority (FCA) to be notified of the use of such agents. This contrasts with the position for payment institutions, which may only use agents if they are registered, with a process for agents to be added to and removed from the FCA register. This

leaves a gap in the regulatory regime which could lead to consumer detriment. This instrument makes provision for the FCA to be notified of, and to have power to prevent, the use of rAISP agents.

7.8 This instrument introduces a schedule to the EMRs to clarify the position for firms carrying on business within scope of the Electronic Money Directive between the UK and Gibraltar.

7.9 This instrument also makes other minor drafting amendments, including consequential amendments to other legislation to ensure the FCA is able to continue to consider spent convictions when assessing authorisation applications for payment institutions.

Changes to the Banking Act 2009 (Inter-Bank Payment Systems) (Disclosure and Publication of Specified Information) Regulations 2010:

7.10 The changes made in this instrument to the Banking Act 2009 (Inter-Bank Payment Systems) (Disclosure and Publication of Specified Information) Regulations 2010 are consequential amendments to reflect changes to the Banking Act 2009 made by the Digital Economy Act 2017

Consolidation

7.11 It is not considered appropriate to consolidate the amended legislation at this time.

8. Consultation outcome

8.1 It was not considered necessary to undertake a consultation. Consultations were undertaken for the transposition of the EU directives which led to some of the original legislation that this SI amends:

- The transposition of the second Payments Services Directive¹
- The transposition of the second Electronic Money Directive².

8.2 The Bank of England were consulted for the changes made in consequence of the Digital Economy Act 2017.

9. Guidance

9.1 It is not considered necessary to issue specific guidance in connection with the amendments made by this instrument.

9.2 The Financial Conduct Authority has previously issued guidance on the Payment Services Regulations 2017 and the Electronic Money Regulations 2011, and will update this guidance where relevant.³

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

¹ <https://www.gov.uk/government/consultations/implementation-of-the-revised-eu-payment-services-directive-psdii>

² <https://www.gov.uk/government/consultations/electronic-money-directive>

³ <https://www.fca.org.uk/publication/finalised-guidance/fca-approach-payment-services-electronic-money-2017.pdf>

10.3 An Impact Assessment has not been prepared for this instrument. Impact assessments have been undertaken previously for some of the statutory instruments it amends:

- The Payment Services Regulations 2017⁴
- The Electronic Money Regulations 2011⁵.

10.4 Part 4 of this SI is consequential on changes made in the Digital Economy Act 2017. Those changes were confirmed as Non-Qualifying Regulatory Provisions

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 This instrument makes amendments to existing legislation, and the amendments will be subject to monitoring and review to the extent provided within each piece of legislation amended.

13. Contact

13.1 Naomi Russell at the HM Treasury Telephone: 020 7270 5784 or email: Naomi.Russell@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.

⁴ <http://www.legislation.gov.uk/ukxi/2017/752/impacts>

⁵ <http://www.legislation.gov.uk/ukxi/2011/99/impacts>