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Brexit & financial services

The E-Money and Payment Services Regime

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Introduction

Electronic money is a form of monetary value which is paid for in advance, stored on an electronic device such as a plastic card with a chip or magnetic strip, and is accepted as a means of payment by persons other than the issuer. It can be used in a manner similar to notes and coins to pay for goods and services in shops. It can also be used to pay for goods ordered on the internet or by phone. It has some features which make it resemble a debit card, but the user does not need to have a bank account. In the case of some kinds of electronic money, losing it may be the equivalent of losing cash.

This note focuses on the changes that have occurred to the UK e-money and payment services regimes as a result of Brexit.

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The Pre-Brexit Regime in the UK

Electronic money

On April 27, 2002 the United Kingdom implemented the Directive on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions (**EMD1**)[1]. Issuing electronic money became a regulated activity under FSMA, and the then FSA brought into force rules governing such matters as capital requirements, liquidity, limitations on investments and activities, redemption rights in respect of electronic money, value limits, and giving information to consumers.

Following a review of EMD1, the Commission identified the need to revise that directive since some of its provisions were considered to have hindered the emergence of a true single market for electronic money services and the development of user-friendly services. It concluded that with the objective of removing barriers to market entry and facilitating the taking up and pursuit of the business of electronic money issuance, the rules to which electronic money institutions are subject needed to be reviewed so as to ensure a level playing field for all payment services providers. The EU therefore enacted Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (**EMD2**)[2]. In order to implement this directive within the UK, with effect from April 30, 2011 the applicable FSA rules were replaced by the Electronic Money Regulations 2011 (the **EMRs**)[3].

The EMRs were again amended in 2017 as a consequence of the revised Directive on Payment Services (2015/2366) ("**PSD2**"). The amendments were made by the Payment Services Regulations 2017 (the **PSRs**)[4].

The EMRs define "*electronic money*" as:

"*electronically (including magnetically) stored monetary value as represented by a claim on the electronic money issuer which-*

(a) is issued on receipt of funds for the purpose of making payment transactions,

(b) is accepted by a person other than the electronic money issuer, and

(c) is not excluded by Regulation 3."

Reg. 3 (as amended by the PSRs) excludes from the definition of electronic money the following:

"*(a) monetary value stored on specific payment instruments that can be used only in a limited way and meet one of the following conditions-*

(i) allow the holder to acquire goods or services only in the issuer's premises;

(ii) are issued by a professional issuer and allow the holder to acquire goods or services only within a limited network of service providers which have direct commercial agreements with the issuer;

(iii) may be used only to acquire a very limited range of goods or services; or

(iv) are valid only in a single EEA State, are provided at the request of an undertaking or a public sector entity, and are regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers which have a commercial agreement with the issuer;

(b) monetary value that is used to make payment transactions resulting from services provided by a provider of electronic communications networks or services, including transactions between persons other than that provider and a subscriber, where those services are provided in addition to electronic communications services for a subscriber to the network or service, and where the additional service is-

(i) for purchase of digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content, and charged to the related bill; or

(ii) performed from or via an electronic device and charged to the related bill for the purchase of tickets or for donations to organisations which are registered or recognised as charities by public authorities, whether in the United Kingdom or elsewhere,provided that the value of any single payment transaction does not exceed £40, and the cumulative value of payment transactions for an individual subscriber in a month does not exceed £240."

Reg. 3(a) is intended to exclude, for example, store cards, petrol cards, membership cards, public transport cards, meal vouchers or vouchers for services.

The Pre-Brexit regulatory regime in the UK

The main features of the regulatory regime pre-Brexit were as follows:

- The entities which may issue electronic money include: credit institutions, including banks (credit institutions do not need to be authorised to issue electronic money); authorised electronic money institutions; and small electronic money institutions.
- Authorisation may be granted by the FCA, which maintains a register of authorised institutions. Conditions for authorisation include: capital adequacy requirements, robust governance arrangements, and effective procedures to identify, manage, monitor and report any risks to which the institution may be exposed.
- An electronic money issuer must on receipt of funds issue without delay money at par value.
- An electronic money issuer must at the request of the electronic money holder redeem at any time up to six years after the date of termination of the contract and at par value the monetary value of the electronic money held. A fee may be charged for redemption, but there are limits on the amount of the fee charged to a consumer and on the circumstances in which a fee may be charged to a consumer.
- Interest may not be paid on electronic money.
- There are restrictions on contracting-out in relation to provisions for the protection of an electronic money holder.

The PSRs applied, subject to exceptions in the case of low value payments, to electronic money payments.

1 Directive 2000/46/EC, available here (repealed on 30 October 2009 by the EMD)
2 Directive 2009/110/EC, available here. The EMD was consolidated together with PSD2 on 23 December 2015, available here.
3 UK SI 2011/99, available here.
4 UK SI 2017/752, available here.

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Payment services

The PSRs 2017 replaced the former Payment Service Regulations 2009 which implemented PSD1, the precursor to PSD2. Most of the changes in PSD II were a response to rapid developments within the payment services market. The included: (1) addressing new security risks for electronic payments caused by the growing technical complexity and volume of electronic payments; (2) covering new types of payment services such as online payments; and (3) responding to new complementary services, such as the provision of account information.

The PSRs apply to 'payment services'. These are given[5] a wide-ranging definition covering eight activities when carried out as a "*regular occupation or business activity*".[6] They encompass the execution of direct debits, standing orders and 'payments executed through a payment card or similar device', as well as money remittance, payment initiation services and account information services.

For completeness, the following are listed as payment services:

(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 payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider—

(i) execution of direct debits, including one-off direct debits;

(ii) execution of payment transactions through a payment card or a similar device;

(iii) execution of credit transfers, including standing orders;

(d) the execution of payment transactions where the funds are covered by a credit line for a payment service user—

(i) execution of direct debits, including one-off direct debits;

(ii) execution of payment transactions through a payment card or a similar device;

(iii) execution of credit transfers, including standing orders;

(e) issuing payment instruments or acquiring payment transactions;

(f) money remittance;

(g) payment initiation services;

(h) account information services.

The key obligations imposed by the PSRs, at least from the perspective of litigation practitioners, are Parts 6 and 7. Part 6 concerns the information requirements for payment services, in particular the information required before and/or after execution of payment orders for payment transactions. Part 7 concerns the respective duties, rights and liabilities as between payment service user and provider in relation to unauthorised payment transactions.

The Pre-Brexit regulatory regime in the UK

Passporting rights enable an authorised[7] firm from one EEA[8] Member State to conduct regulated activities in another EEA Member State by virtue of its home state authorisation. The activities can be conducted through a branch in the host Member State or on a cross-border services basis without using an establishment in the host state. Pre-Brexit FSMA[9] set out the process for UK firms seeking to establish a branch in other EEA Member States.

SEPA, cross-border payments and the IFR

The SEPA Regulation and Payments in euro etc 2012 Regulations

The Single Euro Payments Area (**SEPA**) is a payment-integration initiative created by the European Union (**EU**) to harmonise the way cashless payments transact between euro countries and to ensure that European consumer, businesses and public authorities can make and receive payments in euro under the same basic conditions, rights and obligations.

The SEPA Regulation sets out technical standards, and conduct and information requirements for credit transfers and direct debits in euros. Although it is of direct effect in the UK, certain enforcement elements were required to be implemented by UK legislation, which was done by the Payments in euro etc 2012 Regulations.

The SEPA Regulation applies to:

- PSPs that are "*reachable*" for euro payments; and
- Credit transfers and direct debits denominated in euros – provided that all PSPs involved in the transaction are based in one of the SEPA countries.[10]

The SEPA Regulation does not apply to:

- transactions not denominated in euro – including all sterling-denominated transactions;
- card payments;
- internal transfers within payment service providers;
- most payments transmitted over large-value payment systems (eg, TARGET, or EURO1);
- money remittance and e-money transfers where neither of the accounts involved is a payment identifiable by International Bank Account Number (IBAN); and
- own-account payments by, and payments between, payment service providers.

5 Defined in Schedule 1 Part 1 of the PSRs 2017
6 PSRs 2017, Schedule 1, Part 1 para 1.
7 i.e. authorised under one of the EU single market directives
8 i.e. the EU Member States and three EFTA states
9 Paragraph 19 of Schedule 3
10 The SEPA countries are: the 27 Member States of the EU, 3 countries of the EEA; and 6 non-EEA countries, to which the geographical scope has been extended. Since 31 January 2020, the UK has been included in the latter category. See the EPC list of countries in the SEPA scheme, available here.

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Pursuant to the SEPA Regulation, where a UK-based firm carries out credit transfers or direct debits denominated in euros to an account in one of the SEPA countries, they need to ensure the following:

- Message formats: firms must use the ISO 20022 XML for message formats in the interbank space. Payment service users who send or receive payments in batch files and users submitting batch payment files must also use this message format, except in the case of business to business payments where neither business is a micro-enterprise.
- Business Identifier Code (**BIC**): firms must not make it a mandatory requirement for the payer or payee to provide the BIC to initiate a payment transaction. They should use IBAN instead.
- Reachability: PSPs reachable for euro credit transfer or direct debit services at national level must also establish European-wide reachability by being part of one of the EU-wide schemes. A firm must participate in one of the EU-wide SEPA schemes, managed by the European Payments Council (EPC), to be reachable for euro payments.[11] The EPC maintains registers of all participants in SEPA payment schemes.
- Interoperability: firms must ensure they use euro payment systems which are technically interoperable according to the standards developed by international or European standardisation bodies.
- Multilateral Interchange Fees: firms must phase out per transaction multilateral interchange fees (**MIFs**) for direct debits. Firms will be allowed to use MIFs on R-transactions (which include for example, rejected and recalled transactions) under certain strict conditions.
- Consumer protection: firms have consumer protection obligations for direct debits (for example, the obligation, on a payer's instruction, to limit, block or, where a right of refund is not available, to verify individual payments).
- Payment accessibility: when making or receiving credit transfers or direct debits, users will not be allowed to specify the Member State in which the payment account of their counterparty is located. For example, a utility company based in an EEA country would not be able to direct its bank to only accept direct debits paid from a bank account in its own country.

The ceiling of €50,000 on the 'principle of same charges' has been removed and this now applies to euro-denominated payments of any value. Settlement-based national reporting obligations on PSPs for balance of payments of any value (not just below €50,000) have also been removed.[12]

Pursuant to the Payments in Euros etc 2012 Regulations, the former FSA, now the FCA, was established as the competent authority to monitor compliance and enforce the SEPA requirements in the UK.[13] Those regulations give the FCA information gathering and investigative powers, the power to impose fines, disciplinary measures, seek injunctions and impose consumer redress measures. The Financial Ombudsman Service (**FOS**) is also given jurisdiction to consider and determine complaints linked to credit transfers and direct debits in euros under the regulations.

Cross-border payments

The Cross Border Payments Regulation ("**CBPR1**"), which came into force in 2009, created a level playing field in respect of charges on cross-border payments by requiring PSPs to charge the same fee for a cross-border payment in euros within the Eurozone, as applied to a euro payment within a Member State, up to the value of €50,000.[14]

CBPR1 had the effect of drastically reducing charges for cross-border payments in euro within the Eurozone. However, charges for cross-border payments in euro from non-Eurozone EEA states remained high and this was one of the main reasons for the introduction in 2019 of the new Regulation on Cross Border Payments (2019/518) ("**CBPR2**"), which introduced transparency requirements designed to increase consumer awareness of the charges associated with cross-border payments in euros.

CBPR2 extended the scope of the fee cap provisions, by requiring a PSP to charge the same fee for a cross-border payment in euros as it does for a national (non-euro) currency. This means that a cross-border credit transfer in euros (a SEPA payment) must incur the same transaction fee as an 'equivalent' payment in GBP sterling, made between accounts held with PSPs located in the UK. Other pre-transaction disclosure provisions came into force in April 2020 and further post-transaction disclosure provisions shall come into force in April 2021, as described in paragraph 41 above.

The IFR

The Interchange Fee Regulation ("**IFR**") is European legislation that took effect on 8 June 2015, and which imposes requirements on PSPs, processing entities, other technical service providers, and, sometimes, merchants. The main legislation introduced was a cap on certain interchange fees applicable to payment cards (except American Express cards), but business rules were also introduced by the IFR.

HM Treasury designated the PSR as the lead competent authority in the UK in the Payment Card Interchange Fee Regulations 2015 (the **PCIFRs**),[15] with the FCA also being responsible, in addition to the PSR, for certain functions in relation to monitoring and enforcing compliance.

Where the caps applied, with effect from 9 December 2015, they limited interchange fees to 0.2% of the value of a transaction for consumer debit cards (including prepaid cards), and 0.3% for consumer credit cards. HM Treasury chose not to exercise the national discretion to lower these caps in the UK.

The conduct of business rules introduced by the IFR, and which mainly took effect from 9 June 2016, contain prohibitions and restrictions designed to create and maintain that level playing field, including prohibiting country-specific licensing; requiring independence between payment card schemes and processing entities; permitting the issuer or payer to use multiple card schemes; ensuring that merchant service charges, interchange fees and scheme fees are individually specified (i.e. prohibiting 'blending'); and requiring adherence to the 'honour all cards' rule.

The PSR issued detailed guidance (updated in June 2020) in relation to the IFR and its powers and procedures under the PCIFRs.[16]

In September 2018, the PSR published a Memorandum of Understanding (**MOU**) setting out the framework that it, and authorities in other Member States use to cooperate with one another in relation to monitoring compliance by payment card schemes which provide services on a cross-border basis and their processing entities with Article 7(1)(a) of the IFR and the IFR Regulatory Technical Standards (**RTS**), as set out in the RTS Regulation.[17]

11 See the EPC website, here, for further information.
12 See section C.3.2 below.
13 If a firm has branches in other SEPA countries, the competent authorities designated by these countries will oversee branches' compliance with these requirements.
14 The 2012 regulations set business and technical standards for payments in euro wherever they take place.
15 See Regs. 3 and 16 of the IFRs, available here.
16 Available here.
17 The MOU is available here.

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UK Law Post-Brexit

The basic position following the end of the transition period is that all EU law in force (with some limited exceptions) has been retained and converted into UK law, which is also known as "*onshoring*".[18] As a result, directly effective EU regulations as well as UK secondary legislation that transposed EU directives continue to be binding, the only difference being that they do so on the basis of domestic UK law only. This onshoring process is effected through a set of statutory instruments, called the Brexit SIs.

Brexit SIs

The aim of the Brexit SIs was to ensure the smooth transition of the UK from being a member of the EU to being a "*third country*". They do not make policy changes, except those necessary to reflect the UK's new position as a non-EU Member State. Pursuant to the power set out in section 8(1) of the European Union (Withdrawal) Act 2018 (the **EUWA**), the UK introduced the following regulations to address UK payment services and e-money activity and regulation post-Brexit:

- The Credit Transfers and Direct Debits in Euro (Amendment) (EU Exit) Regulations 2018 (**CTDDRs**);[19]
- The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (**EMPSRs**);[20]
- The Interchange Fee (Amendment) (EU Exit) Regulations 2019 (the **IFR Exit Regs**)[21] and the Technical Standards (Interchange Fee Regulation) (EU Exit) Instrument 2019;[22] and
- The EEA Passport Rights (Amendment etc and Transitional Provisions) (EU Exit) Regulations 2018 (the **EEA Passport Rights Regs**).[23]

Most of those regulations came into force on "*exit day*", 31 January 2020 (with some transitional parts coming into force the day after they were made). In addition:

- On 26 October 2018, the Financial Regulators' Powers (Technical Standards etc) (Amendment etc) (EU Exit) Regulations 2018 (the **2018 Exit Regs**)[24] came into force;
- On 6 September 2019, the Financial Services (Electronic Money, Payment Services and Miscellaneous Amendments) (EU Exit) Regulations 2019 were published by HM Treasury (the **2019 Exit Regs**).[25]

Equivalence regime

No equivalence regime in place for payment services generally

Equivalence refers to a decision by one state to recognise another state's legal requirements for regulating a good or service, even though they may not be exactly the same.

Both the UK and the EU have a range of over 40 individual equivalence regimes in their financial services regulation, which the EU groups into 28 heads.[26] Accordingly, approximately one quarter of financial services legislation provides for equivalence, which permits the Commission to adopt an equivalence decision to the effect that the legal and supervisory framework of a third country ensures that entities authorised or registered in that third country comply with legally binding requirements which are equivalent to the requirements set out in the relevant EU legislation.

However, there are no provisions in the payment services sphere which allow the Commission to adopt an equivalence decision in respect of the UK, as a third country, and its regulation and supervision of PSPs and EMIs and other firms performing payment services.

Any equivalence arrangements for the payments industry would therefore need to be addressed in new legislation between the Commission and the UK. Thus, although equivalence has been regarded as a route for the UK to take to resolve the position post-Brexit, it is not an option currently available for payment services.

SEPA regime retained

The position in respect of SEPA is slightly different. Although there is no equivalence regime under the SEPA Regulation, and although, on 1 February 2020, the UK became a non-EEA SEPA country, on 7 March 2019, the EPC approved the continued participation of UK PSPs in the SEPA schemes after the UK's exit from the EU.[27]

This means that the UK's SEPA membership has been preserved after the transition period and that UK PSPs can continue to interact with other PSPs and firms providing payment services in other SEPA countries on current terms. To that extent, the UK SEPA regime has been determined to be 'equivalent'.

Passporting and the Temporary Permissions Regime (TPR)

After the end of the transition period, the passporting regime ended. This means that entities based in EU Member States no longer have the right, on an establishment or services basis, to conduct regulated activities in the UK without UK authorisation; and UK persons similarly have no passporting rights to do the same in any EU Member State (unless they are also authorised in an EU Member State).

Therefore, pursuant to Schedule 3[28] of the EMPSRs, the temporary permissions regime (**TPR**) was been created. It is designed to enable relevant firms which passported into the UK to continue operating in the UK after the passporting regime fell away at the end of the transition period.

The TPR gives a three-year period lasting until 29 March 2022 (although HM Treasury has the power to extend the regime by up to one year at a time) within which the firm can continue to access the UK market, pending determination of an application for full UK authorisation, if required. The TPR covers both existing business, and new business entered into during the transition period.

18 See sections 2-3 of the European Union (Withdrawal) Act 2018 which provide that EU-derived domestic legislation will continue to have effect and direct EU legislation will be incorporated into domestic UK law.
19 CTDDRs: UK SI 2018/1199, available here.
20 EMPSRs: UK SI 2018/1201, available here.
21 IFR Exit Regs: UK SI 2019/284, available here.
22 Available here.
23 EEA Passport Rights Regs, available here.
24 2018 Exit Regs, UK SI 2018/1115, available here.
25 2019 Exit Regs, UK SI 2019/1212, available here.
26 See the Commission's 29 July 2019 press release, available here.
27 See the EPC's Decision Paper, available here.
28 Paragraphs 12A–36 of Schedule 3 (for PSPs) and paragraphs 1-12 of Schedule 3 (for EMIs)

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Firms had until the end of the transition period (31 December 2020) to notify the FCA that they wished to use the TPR.[29]

For PSPs, paragraphs 13-24 of Schedule 3 to the EMPSRs provide the TPR regime.

- Per paragraph 14, an EEA based PSPs, which was already authorised to provide payment services in the UK in the exercise of a passport right and notified the FCA in accordance with paragraph 15, is taken to be an authorised PSP under the PSRs 2017.
- Paragraph 15 required that notification is given to the FCA during the transition period prior to IP Completion Day. The notification had to provide the information set out in paragraph 15(2) such as address, payment services in relation to which the PSP has passporting rights and whether the services are provided on a branch basis or not.
- Per paragraph 18 of Schedule 3 there are various duties imposed on a PSP relying on TPR authorisation including a duty to notify the FCA of any cancellation or variation by the PSPs home state competent authority of their authorisation to provide payment services.

To ensure a smoother transition, the EMSPRs also provided for a continuation of authorisation for limited purposes to protect rights of payment service users and PSPs under the PSRs where there are outstanding obligations after IP Completion Day (31 December 2020[30]) under contracts entered into prior to IP Completion Day (see Part 3 of Schedule 3 to the EMPSRs). There is equivalent provision for EMIs (see Part 2 of Schedule 3 to the EMPSRs).

The EMSPRs make equivalent provision for EMIs both in relation to the TPR regime (per paragraphs 1-12) and the continuation of authorisation for limited purposes (per paragraphs 12A-12M). The criteria for both are the same as that for PSPs. It should be noted that under the amended EMRs, the payment services which can be provided by an authorised EMI without a head office in the UK must be related to e-money activity. EMIs who were entitled to provide a more flexible range of services under their PSP passport rights continue to enjoy such flexibility under the PSP TPR regime but will need to consider how the changes affect their business longer term.

Safeguarding regulations

Under the PSRs, PSPs (and electronic money institutions providing payment services) must safeguard client funds such that these funds are returned to these clients in the event the firm becomes insolvent. Currently, this is generally done by having segregated accounts: with firms keeping their own funds separate from their clients' funds, and many of these accounts are in the EU. By paragraph 29, the EMPSRs amend the regulations such that PSPs are able to hold safeguarding accounts at an approved foreign credit institution in any state that is a member of the OECD. This is in line with the approach to safeguarding of client assets in asset management.

There is equivalent provision in relation to EMIs at paragraph 7 of the EMPSRs. Both only come into force on IP Completion Day.

Main amendments contained in the EMPSR concerning e-money

E-money institutions are required to safeguard funds that have been received in exchange for electronic money that has been issued. The safeguarding options in the EMRs were:

- option 1: to hold the funds in a separate account with an authorised credit institution or the Bank of England, or to invest the relevant funds in secure, liquid, low-risk assets and place those assets in a separate account with an authorised custodian;
- option 2: to ensure that any relevant funds are covered by an insurance policy with an authorised insurer, a comparable guarantee from an authorised insurer, or a comparable guarantee from an authorised credit institution (with additional ring-fencing requirements on insolvency).

The EMPSRs amends this as follows:

- In safeguarding option 1, "*authorised credit institution*" will include an "*approved foreign credit institution*". This is defined as meaning:

  "the central bank of a State that is a member of the Organisation for Economic Co-operation and Development ("an OECD state"),

  a credit institution that is supervised by the central bank or other banking regulator of an OECD state, any credit institution that-

  a. is subject to regulation by the banking regulator of a State that is not an OECD state,

  b. is required by the law of the country or territory in which it is established to provide audited accounts,

  c. has minimum net assets of £5 million (or its equivalent in any other currency at the relevant time),

  d. has a surplus of revenue over expenditure for the last two financial years, and

  e. has an annual report which is not materially qualified."

- In safeguarding option 1, "*authorised custodian*" will be limited to "*a person authorised for the purposes of the 2000 Act to safeguard and administer investments*". The definition no longer will include the words "*or authorised as an investment firm under Article 5 of Directive 2014/65/EU on markets in financial instruments which holds those investments under regulatory standards at least equivalent to those set out under Article 16 of that directive*".
- In safeguarding option 2, "*authorised insurer*" will be limited to "*a person authorised for the purposes of the 2000 Act to effect and carry out a contract of general insurance as principal*". The definition will no longer include a person "*otherwise authorised in accordance with Article 14 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) to carry out non-life insurance activities within the meaning of Article 2(2) of that Directive*".

29 See the FCA website for further details, available here. Firms must notify the FCA using the Connect system by submitting the Firm Temporary Permission Notification form.

30 per s39(1) of the Withdrawal Agreement Act 2020

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Schedule 3 Part 1 of the EMPSRs provides for transitional arrangements for up to 3 years for persons who prior to exit day are entitled to provide electronic money issuance, redemption, distribution or payment services in the United Kingdom in the exercise of a passport right as an EEA authorised electronic money institution, and who would cease to be entitled to do so after exit day. Such persons may notify the FCA that they wish to be treated as an authorised electronic money institution. The EMPSRs contains detailed requirements regarding the notification and the transitional arrangements.

The EMPSRs also contain numerous amendments which delete references to EU entities, institutions and legislation.

Other amendments concerning payment services

Post 31 December 2020, the UK has maintained participation in SEPA (as at the date of writing). If the UK is unable to continue to participate within SEPA, the UK government has the power under regulation 15 of the **CTDDRs** to remove the SEPA Regulation from the statute book. By paragraph 63, the EMPSRs amend the PSRs to allow that if the SEPA Regulations is revoked the Treasury may by regulations make such amendments to the PSRs as appear appropriate in connection with the revocation (such regulations may be annulled by a resolution in either House of Parliament).

SEPA, the IFR and cross-border payments

The CTDDRs

The CTDDRs came into force on exit day. They retain, but make amendments to the SEPA Regulation and the Payments in euros etc 2012 Regulations.

The CTDDRs maximise the prospect of the UK maintaining access to the SEPA by retaining the SEPA Regulation with amendments. Those amendments primarily alter the wording of the text and take into consideration the UK's position as a third-country rather than as a Member State. As stated above, pursuant to regulation 15, Part 4 of the CTDDRs gives the UK the power to revoke the SEPA Regulation from the UK legal framework, should the UK be unable to continue to participate within SEPA. It is important to note that, because the EPC is not part of the EU institutional framework, it is the EPC which will continue to be responsible for the SEPA Rulebooks and it is those rules which SEPA members (including the UK) must continue to adhere to.

As to the cross-border payments regime, this was revoked on 31 December 2020 by 2019 Exit Regs.[31] This means that, although CBPR2 provisions in relation to further disclosure requirements came into force in the EU in April 2021, the UK has not "*onshored*" that legislation, which fell away after 31 December 2020.

The IFR Exit Regs

In relation to the IFR, the IFR Exit Regs "*onshore*" the IFR.

Pursuant to the 2018 Exit Regs, HM Treasury delegated EUWA powers to the PSR to onshore the RTS Regulation adopted under Article 7 of the IFR and to maintain it in the future. Accordingly, the PSR has become the relevant authority responsible for RTS in relation to the IFR post-Brexit.

In March 2019 the PSR published a policy statement adopting the EU Exit Instrument as at exit day and a corresponding schedule containing the amended RTS Regulation that were "*onshored*" after the implementation period.[32]

Accordingly, transactions which take place solely with the UK (where both the acquirer and the card issuer are located in the UK) are covered by the onshored IFR and subject to the interchange fee caps as before. However, cross-border card payments between the UK and the EU, where the acquirer or card issuer are based in different jurisdictions, are no longer subject to the caps established under the EU IFR or the onshored IFR. This means that there is scope for interchange fees to be increased for cross-border card payments between the UK and the EU.

Practical consequences of Brexit

E-money implications

Whilst the definition of "*authorised custodian*" and "*authorised insurer*" is now limited effectively to exclude EU authorised firms, post-Brexit, UK authorised payment institutions and electronic money institutions may hold safeguarding accounts with an "*approved foreign credit institution*" following the end of the transition period under the expansion set out in the Brexit legislation.

Several electronic money institutions registered in the UK (and Gibraltar) have established subsidiaries in EU Member States to maintain EEA passporting rights.

Since leaving the EU, the FCA has issued a consultation paper (CP 21/3) setting out its proposed changes to payment service and e-money guidance, including as a result of Brexit. The proposed guidance focuses on maximising the prospects of the UK remaining in SEPA and allowing firms to continue to hold relevant funds in safeguarding accounts with a credit institution outside of the UK and EEA.

EU electronic money issuers may continue to operate in the UK under the temporary permission regime, but an EU electronic money issuer will no longer be able to hold safeguarded funds in an account with a UK credit institution, as UK credit institutions will cease to be EU credit institutions.

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31 Reg 33(b) of UK SI 2019/710, available here.
32 Available here.

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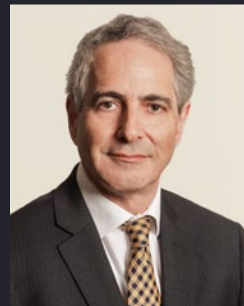

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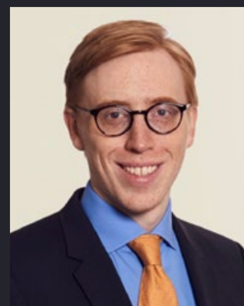

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