

Policy statement

Onshoring EU regulatory technical standards under the Interchange Fee Regulation

March 2019

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Policy Statement

Introduction

- 1.1** This policy statement sets out the final EU Exit instrument onshoring the regulatory technical standards¹ Regulation ('RTS Regulation')² adopted under Article 7 of the Interchange Fee Regulation ('IFR').³
- 1.2** In November 2018, the Payment Systems Regulator (PSR) published a consultation paper (CP18/03)⁴ outlining our proposed amendments to the RTS Regulation, which are designed to ensure it can still operate effectively if the UK leaves the European Union ('EU') without a withdrawal agreement or implementation period in place (commonly referred to as a 'no-deal scenario').
- 1.3** This EU Exit instrument is now adopted and will take effect on 29 March 2019 ('exit day') in a no-deal scenario.

Who does this affect?

- 1.4** The onshoring of the RTS Regulation outlined in this policy statement will be of interest to:
- card schemes subject to Article 7 of the IFR
 - parties contracting with card schemes and/or processing entities (for example, issuers and acquirers)
 - third-party card payment processors

Context

- 1.5** On exit day, the European Union (Withdrawal) Act 2018 ('EUWA') will repeal the European Communities Act 1972 and convert existing directly applicable EU law (including EU Regulations) into UK law.
- 1.6** The EUWA also gives ministers time-limited powers to make secondary legislation to prevent, remedy or mitigate:
- any failure of retained EU law to operate effectively, or
 - any other deficiency in retained EU law

1 Regulatory technical standards (RTS) are a subcategory of binding technical standards (BTS) endorsed by the European Commission, by means of delegated acts under Article 290 of the Treaty on the Functioning of the European Union (TFEU).

2 Official Journal of the European Union L 13 (18 January 2018), pages 1 to 7: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.013.01.0001.01.ENG

3 Official Journal of the European Union L 123 (19 May 2015), pages 1 to 15: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2015%3A123%3AFULL>

4 www.psr.org.uk/psr-publications/consultations/cp18-3-onshoring-EU-regulatory-technical-standards-under-the-IFR

- 1.7** Deficiencies would include functions currently carried out by EU authorities that need to be transferred to the UK and provisions requiring participation in EU institutions that should be omitted.⁵
- 1.8** The IFR will continue to apply in the UK after exit day as it will be converted into UK law by the EUWA. The statutory instrument onshoring the IFR was made on 13 February 2019.⁶
- 1.9** The Treasury has delegated EUWA powers to the PSR to onshore the RTS Regulation adopted under Article 7 of the IFR and maintain it in the future.⁷ These powers are linked to our role as the main competent authority for monitoring and enforcing the IFR in the UK.
- 1.10** Article 7(1)(a) of the IFR requires payment card schemes and processing entities to be independent in terms of accounting, organisation and decision-making processes. The RTS Regulation sets out the specific requirements applicable to payment card schemes and processing entities.
- 1.11** We published CP18/3 as part of the work we have been doing to ensure that there is a functioning regulatory framework in place in the event of a no-deal scenario. We have amended the RTS Regulation to ensure that it:
- functions effectively after the UK leaves the EU on exit day
 - is consistent with the amendments the Treasury made to the IFR under the EUWA

Summary of feedback on CP18/3 and our response

- 1.12** The consultation period ran from 19 November to 17 December 2018. We received four responses from HSBC, Mastercard, UK Finance and Nationwide.
- 1.13** None of the respondents objected to our proposed amendments and they did not propose any additional amendments to the EU Exit instrument onshoring the RTS Regulation. Therefore the EU Exit instrument presented in Annex 2 has not been amended since the version included in CP18/3.
- 1.14** Respondents made some general observations on the onshoring of the IFR and future regulatory developments in this area in a no-deal scenario. These considerations are outside the scope of the consultation or fall within the Treasury's remit, as the department responsible for onshoring the IFR.
- 1.15** Following the consultation, we consulted the Bank of England in drafting the final EU Exit instrument and obtained the Treasury's approval.

5 For examples of deficiencies, see HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act, section 1.16: <https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>

6 http://www.legislation.gov.uk/ukSI/2019/284/pdfs/ukSI_20190284_en.pdf

7 http://www.legislation.gov.uk/ukSI/2018/1115/pdfs/ukSI_20181115_en.pdf

Equality and diversity

- 1.16** We have considered the equality and diversity issues that may arise from the content of this policy statement. We do not believe that the content of this policy statement adversely impacts groups with protected characteristics – i.e. age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment.

Adoption of the EU Exit instrument

- 1.17** The PSR has now adopted the EU Exit instrument onshoring the RTS Regulation. If the UK leaves the EU in a no-deal scenario, the RTS Regulation will be converted into UK law on exit day and the EU Exit instrument onshoring the RTS Regulation will take effect.
- 1.18** The instrument is available in Annex 1 of this paper.

Next steps

- 1.19** If the UK and the EU ratify a withdrawal agreement, and there is an implementation period, the EU Exit instrument onshoring the RTS Regulation will not come into effect on exit day.
- 1.20** In that case, any amendments we make to the RTS Regulation will take effect after the implementation period ends. We will consider in due course whether we need to amend the EU Exit instrument to accommodate the outcome of negotiations on the future relationship between the UK and the EU.

Annex 1

Technical Standards (Interchange Fee Regulation) (EU Exit) Instrument 2019

EXITING THE EUROPEAN UNION
TECHNICAL STANDARDS (INTERCHANGE FEE REGULATION)
(EU EXIT) INSTRUMENT 2019

Powers exercised

- A. The Payment Systems Regulator (“the PSR”), being the appropriate regulator within the meaning of the Financial Regulators’ Powers (Technical Standards) (EU Exit) Regulations 2018 (“the Regulations”), with the approval of the Treasury, makes this instrument in exercise of the power conferred by regulation 3(1) of the Regulations.

Pre-conditions to making

- B. The PSR is the appropriate regulator for the Commission Delegated Regulation (EU) 2018/72 specified in Part 6 of the Schedule to the Regulations.
- C. The PSR has consulted the Bank of England as appropriate in accordance with regulation 5 of the Regulations.
- D. A draft of this instrument has been approved by the Treasury, the Minister considering that it makes appropriate provision to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the European Union

Interpretation

- E. In this instrument:
“Exit Day” has the meaning given in the European Union (Withdrawal) Act 2018.
- F. Any reference in this instrument to any EU Regulation or EU Directive legislation (within the meaning of section 20 of the European Union (Withdrawal) Act 2018) is, unless the contrary intention appears, to be treated as a reference to that EU regulation or EU Directive which is part of UK law by virtue of the European Union (Withdrawal) Act 2018.

Amendments

- G. The PSR makes the amendments contained in the Schedule to the Commission Delegated Regulation (EU) 2018/72.

Commencement

- H. This instrument comes into force on Exit Day.

Citation

- I. This instrument may be cited as the Technical Standards (Interchange Fee Regulation) (EU Exit) Instrument 2019.

By decision of the PSR Board on 30 January 2019.

SCHEDULE

COMMISSION DELEGATED REGULATION (EU) 2018/72

of 4 October 2017

supplementing Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions with regard to regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of independence requirements in terms of accounting, organisation and decision-making process

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2015/751 of 29 April 2015 of the European Parliament and of the Council on interchange fees for card-based payment transactions (1) and in particular Article 7(6) thereof,

Whereas:

- (1) In order to specify the requirements ensuring separation of payment card schemes and processing entities, it is appropriate to define certain terms in relation to the accounting, organisation and the decision making process of payment card schemes and processing entities, irrespective of the legal form adopted by those entities.
- (2) Payment card schemes and processing entities should have accounting processes in place that enable them to produce financial information on separated profit and loss accounts and explanatory notes to that financial information. Those requirements should not replace or amend accounting principles and standards or requirements concerning the annual financial statements that already apply to payment card schemes and processing entities.
- (3) For that purpose, it is appropriate to specify how expenses and revenues should be allocated under those accounting processes. Those accounting processes should be duly documented, in particular in relation to transfers of funds between payment card schemes and processing entities.
- (4) In order to ensure independence, payment card schemes and participating processing entities should produce financial information at least annually and that information should be reviewed by an independent auditor. That information as well as its review should be made available to competent authorities upon their request to enable them to ensure enforcement of independence requirements.
- (5) Payment card schemes and processing entities that are not separate legal persons should at least be organised as different internal business units. Staff of payment card schemes and staff of the processing entities, including senior management, should be independent and accommodated in separated workspaces equipped with restricted controlled access.

To promote the independence of senior managers when two entities are part of the same group and to prevent the practice of ‘revolving doors’, senior managers should be prohibited from taking on work for the other side of the business for a minimum duration of one year after they have left the entity they were working for.

- (6) Staff of payment card schemes should only be allowed to perform tasks related to the design, update or implementation of processing services where specific conditions ensuring compliance with independence requirements are met.
- (7) To avoid any incentives for payment card schemes or for processing entities to provide each other, via their staff, with preferential treatment or privileged information not available to their competitors, remuneration frameworks for staff of payment card schemes and of processing entities should not be based directly or indirectly on the economic performance of the processing entities or the payment card schemes. Remuneration policies should be made fully available to competent authorities upon their request.
- (8) It is appropriate to specify that when the payment card scheme and the processing entity are part of the same legal entity or group, rules for ensuring compliance of staff with the current Regulation should be laid down in a code of conduct with effective sanctions and enforcement mechanisms that should be made public.
- (9) Payment card schemes and processing entities should be allowed to use shared services provided that this usage does not result in sharing sensitive information between them and that the conditions for sharing the services, including the financial conditions under which those services are offered, are duly documented in a single document. That document should be made available to competent authorities upon their request to enable them to ensure the application of independence requirements. Specific conditions for the sharing of the information management system should be introduced. Sharing of sensitive information between payment card schemes and processing entities which may give either the payment scheme or the processing entity a competitive advantage should however be prohibited.
- (10) It is appropriate to set out conditions for the composition of the management bodies of the payments card schemes and processing entities, irrespective of their legal form and organisational arrangements, to ensure that potential conflicts of interest for the decision making process between the payment card schemes and processing entities are appropriately mitigated. Those conditions should be made public and subject to review by competent authorities. Furthermore, payment card schemes and processing entities should have separated annual operating plans approved by their relevant management bodies. Those separated annual operating plans should be made fully available to competent authorities upon their request, to enable them to ensure enforcement of independence requirements.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority (‘EBA’) to the Commission.

- (12) EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council (2),

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes the requirements to be complied with by payment card schemes and processing entities to ensure the application of Article 7(1)(a) of Regulation (EU) 2015/751.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (1) ‘management body’ means a payment card scheme's or processing entity's body appointed in accordance with national law, which is empowered to set the entity's strategy, objectives and overall direction and which oversees and monitors management decision-making, and includes the persons who effectively direct the business of the entity;
- (2) ‘senior management’ means those natural persons within a payment card scheme or processing entity who exercise executive functions and who are responsible and accountable to the management body for the day-to-day management of the payment card scheme or processing entity;
- (3) ‘remuneration’ means all forms of fixed and variable remuneration, including payments made or benefits, monetary or non-monetary, awarded directly by or on behalf of the payment card scheme or processing entity to employees;
- (4) ‘shared services’ means any activity, function or service performed by either an internal unit within a payment card scheme or processing entity or a separate legal entity and executed to the benefit of both the payment card scheme and the processing entity;
- (5) ‘group’ means a parent undertaking and all its subsidiary undertakings as defined in Article 2(11) of Directive (EU) 2013/34 of the European Parliament and of the Council (3).
- (6) ‘Payment Systems Regulator’ means the body established under section 40(1) of the Financial Services (Banking Reform) Act 2013.

CHAPTER II
ACCOUNTING

Article 3

Financial information

1. Payment card schemes and participating processing entities shall have accounting processes in place that enable them to produce financial information on separated profit and loss accounts and explanatory notes to that financial information.
2. The financial information referred to in paragraph 1 shall comply with the applicable accounting framework for preparing financial statements of payment card schemes and processing entities.

Article 4

Allocation of expenses and revenues

1. The financial information referred to in Article 3(1) shall be based on an allocation of expenses and revenues between the payment card scheme and the processing entity in accordance with the following rules:
 - (a) expenses and revenues that are directly attributable to the provision of processing services shall be allocated to the processing entity;
 - (b) expenses and revenues that are directly attributable to the payment card scheme shall be allocated to the payment card scheme;
 - (c) expenses and revenues that are not directly attributable to the provision of processing services or to the payment card scheme shall be allocated on an activity-based costing ('ABC'), which involves allocating indirect costs and revenues according to the actual consumption by the processing services entity or by the payment card scheme;
 - (d) expenses and revenues that are not directly attributable and cannot be allocated on ABC shall be allocated according to an accounting methodology documented in a supporting note.
2. The supporting note referred to in paragraph 1(d) shall indicate for each allocated cost and revenue under that methodology:
 - (a) the basis for the allocation;
 - (b) the rationale for that basis.

Article 5

Documentation of transfer of financial resources between payment card schemes and processing entities

1. Payment card schemes and processing entities shall produce specific explanatory notes for any transfer of financial resources between them for the provision of services or the use of shared services as referred to in Article 12. Those explanatory notes shall specify

the prices of and fees for those services, irrespective of any underlying obligations and organisational arrangements that may exist between them. Those explanatory notes shall be included in the financial information referred to in Article 3(1).

2. Where payment card schemes and processing entities belong to the same legal entity or group, the specific explanatory notes referred to in paragraph 1 shall provide evidence that the prices and fees for the provision of services between them or the use of shared services do not differ from prices and fees for the same or, in absence thereof, comparable services charged between payment card schemes and processing entities that do not belong to the same legal entity or group.

Article 6

Review and frequency of financial information

1. The financial information produced in accordance with Articles 3, 4 and 5 shall be reviewed by an independent and certified auditor.
2. The review referred to in paragraph 1 shall be provided in the form of a report ensuring:
 - (a) a trustworthy and fair view of the financial information produced by payment card schemes and processing entities;
 - (b) consistency and comparability of the financial information with the accounting frameworks for preparing financial statements of payment card schemes and processing entities;
 - (c) consistency of the financial information with previous years' allocation policies or, where such consistency is lacking, an explanation as to why the allocation policy has been changed and a restatement of previous years' figures.
3. The financial information referred to in Articles 3, 4 and 5 shall be submitted to the auditor referred to in paragraph 1 annually and shall be made fully available to competent authorities the Payment Systems Regulator upon their its request, together with the review by the independent auditor.

CHAPTER III

ORGANISATION

Article 7

Functional separation

Payment card schemes and processing entities that are not established as two separate legal entities shall be organised in two separate internal business units.

Article 8

Separation of workspaces

Payment card schemes and the processing entities that are located in the same premises shall be organised in separate workspaces equipped with restricted and controlled access.

Article 9

Independence of senior management

The senior management of payment card schemes or of the payment card scheme business unit shall be different from the senior management of processing entities or of the processing entity business unit, and act autonomously. The senior management of payment card schemes or payment card scheme business units shall not be allowed to take on work for processing entities or processing entity business units, and vice versa, for a minimum duration of one year after that senior management left the entity for which they have been working.

Article 10

Independence of staff

1. The staff of payment card schemes shall be different from the staff of processing entities.
2. The staff of payment card schemes and of processing entities may perform tasks related to the provision of shared services as referred to in Article 12.
3. The staff of a processing entity may perform tasks related to the design of the single set of rules, practices, standards and implementation guidelines for the execution of card-based payment transactions, provided that:
 - (a) the tasks related to the design of the single set of rules may be performed by other processing entities on a non-discriminatory basis;
 - (b) the design of those rules involves a representative sample of all processing entities participating in the payment card scheme.

Article 11

Remuneration

1. Processing entities shall adopt remuneration policies that do not create incentives for their staff to provide a payment card scheme with preferential treatment or privileged information which is not available to other competitors. Remuneration of their staff shall therefore reflect the performance of the processing entity and shall not be directly or indirectly linked to the performance of the payment card scheme to which the processing entity provides services.
2. Payment card schemes shall adopt remuneration policies that do not create incentives for their staff to provide a processing entity with preferential treatment or privileged information which is not available to other competitors. Remuneration of their staff shall therefore reflect the performance of the payment card schemes and shall not be directly or indirectly linked to the performance of a processing entity.
3. Remuneration policies referred to in paragraphs 1 and 2 shall be made fully available to competent authorities the Payment Systems Regulator upon ~~their~~ its request.

Article 12

Use of shared services

1. Payment card schemes and processing entities making use of shared services shall describe in a single document the list of shared services and the conditions, including the financial conditions, under which those services are provided.
2. The single document referred to in paragraph 1 shall be made available to ~~competent authorities~~ the Payment Systems Regulator upon ~~their~~ its request.

Article 13

Use of a shared information management system

An information management system that is shared by a payment card scheme and a processing entity shall ensure that:

- (a) the staff of the payment card scheme and of the processing entity are separately identified via the authentication procedure to access the information management system;
- (b) users only have access to information which they are entitled to in compliance with this Regulation. In particular, any sensitive information, as referred to in Article 14, of a processing entity shall not be accessed by the staff of the payment card scheme and any sensitive information of a payment card scheme shall not be accessed by the staff of the processing entity.

Article 14

Sensitive information

Payment card schemes and processing entities shall not share information of a sensitive nature that provides a competitive advantage to either the payment scheme or the processing entity where such information is not shared with other competitors.

Article 15

Code of conduct

1. Payment card schemes and processing entities which belong to the same legal entity or group shall define and disclose publicly on their website a code of conduct, setting out how their respective staff shall act to ensure compliance with this Regulation. The code of conduct shall also set effective enforcement mechanisms.
2. The code of conduct shall, in particular, define rules to prevent the sharing of sensitive information, as referred to in Article 14 between payment card schemes and processing entities. The code of conduct shall be subject to review by ~~competent authorities~~ the Payment Systems Regulator.

CHAPTER IV
DECISION-MAKING PROCESS

Article 16

Independence of the management bodies

1. Payment card schemes and processing entities shall ensure that the composition of their management bodies mitigates conflicts of interest for the decision-making process between the payment card scheme and the processing entity, including by setting clear and objective criteria under which directorships may be held by the same person at the same time in the management body of the payment card scheme and of the processing entity. Those criteria shall be made public and shall be subject to review by the competent authorities Payment Systems Regulator.
2. The management bodies of payment card schemes and processing entities that belong to the same legal entity or group shall approve and periodically review conflict of interest policies for managing and monitoring the compliance with this Regulation.
3. For the purposes of paragraph 2 and where directorships may be held by the same person in the management body of the payment card scheme and of the processing entity, payment card schemes and processing entities shall establish:
 - (a) a separate management body responsible for decisions related to the payment card scheme activities, with the exemption of shared services referred to in Article 12, and which shall be composed of members of the management body that do not perform any executive function in relation to processing activities. Those members shall advise the management body on the payment card scheme strategy in compliance with this Regulation and assist the management body in overseeing the implementation of that strategy by senior management;
 - (b) a separate management body responsible for decisions related to the processing activities, with the exemption of shared services referred to in Article 12, and which shall be composed of members of the management body that do not perform any executive function in relation to payment card scheme activities. Those members shall advise the management body on the processing entity strategy in compliance with this Regulation and assist the management body in overseeing the implementation of that strategy by senior management;
 - (c) independent reporting lines from the senior management of either the payment card scheme business unit or of the processing entity business unit, as applicable, to the management body.
4. The organisational arrangements established in accordance with paragraph 3 shall be made available to competent authorities the Payment Systems Regulator upon their its request.
5. The management body shall retain overall responsibility for ensuring compliance with this Regulation.

Article 17

Annual operating plan independence

1. Payment card schemes and processing entities shall have separate annual operating plans determining the budget, including capital and operating expenditures and possible authority delegations to engage those expenditures, which shall be submitted to their respective management body for approval or, where relevant, to the management body referred to in Article 16.
2. The separated annual operating plans shall be made fully available to ~~competent authorities~~ the Payment Systems Regulator upon ~~their~~ its request.

CHAPTER V

FINAL PROVISIONS

Article 18

Entry into force

~~This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.~~

~~This Regulation shall be binding in its entirety and directly applicable in all Member States.~~

Done at Brussels, 4 October 2017.

For the Commission

The President

Jean-Claude JUNCKER”

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- (1) ~~As amended by The Interchange Fee (Amendment) (EU Exit) Regulations 2018 OJ L 123, 19.5.2015, p. 1.~~
 - (2) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).
 - (3) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

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12 Endeavour Square
London E20 1JN
Telephone: 0300 456 3677
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