Chapter 15

Guidance on the scope of the Payment Services Regulations 2017

15.5 Negative scope/exclusions

Schedule 1 Part 2 to the PSRs 2017 contains a list of activities which do not constitute payment services. The following questions only deal with a selection of these. You should consult Annex 3 to this chapter for a full list of provisions, if you require more details.

Q33. Our business consists of cash payments directly from or to our customers - do the regulations apply to us?

No. The PSRs 2017

do not apply to payment transactions made in cash, without the intervention of an intermediary (see ■ PERG 15 Annex 3, paragraph (a)).

Q33A.We are an e-commerce platform that collects payments from buyers of goods and services and then remits the funds to the merchants who sell goods and services through us – do the regulations apply to us?

Recital 11 of PSD2 makes it clear that some e-commerce platforms are intended to be within the scope of regulation. Whether an e-commerce platform is in or out of scope of the PSRs 2017 will depend on its business model.

An e-commerce platform may not be carrying on payment services at all: for example, if the platform is a re-seller of the goods or services (i.e. is acting as principal in the sale or supply of goods or services having purchased them from a third party), such that it is the intended recipient of the funds paid by the customer and there is no contract between the customer to whom the goods or services are now being sold and the third party from whom the platform purchased the goods or services.

If they are providing payment services, the platform should consider whether they are doing so as a regular occupation or business activity (see Q9).

The platform should also consider whether they fall within the exclusion at ■ PERG 15 Annex 3, paragraph (b). The PSRs 2017 do not apply to payment transactions from the payer to the payee through a commercial agent authorised via an agreement to negotiate or conclude the sale or purchase of goods or services on behalf of either the payer or the payee but not both the payer and the payee.

An example of where a platform will be acting for both the payer and the payee would be where the platform allows a payer to transfer funds into an account that it controls or manages, but this does not constitute settlement of the payer's debt to the payee, and then the platform transfers corresponding amounts to the payee, pursuant to an agreement with the payee.

In our view, you have the authority to conclude the sale or purchase of goods or services on behalf of the payer or the payee only if you have the

authority to affect the legal relations of your principal, who is the payer or the payee, with third parties and to bind the payer or payee to a purchase or sale of goods or services. This would not be fulfilled simply by providing the technical means by which a payer places or a payee accepts an order.

If an e-commerce platform is providing payment services as a regular occupation or business activity and does not benefit from an exclusion or exemption, it will need to be authorised or registered by us.

An example of an e-commerce platform that is likely to need to be authorised or registered by the FCA is one that provides escrow services as a regular occupation or business activity. Escrow services generally involve a payment service consisting of the transfer of funds from a payer to a payee, with the platform holding the funds pending the payee's fulfilment of certain conditions or confirmation by the payer. It should be kept in mind that an escrow service may be a regular occupation or business activity of a platform even if it is provided as part of a package with other services. Escrow providers do not typically have the authority to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee, and in those circumstances, would not fall within the exclusion for commercial agents.

Q33B.We are a professional cash collection company. We collect coins and banknotes from our customers and then remit them electronically to our customers' bank accounts – do the regulations apply to us?

No. The PSRs 2017 do not apply to the professional physical transport of banknotes and coins, including their collection, processing and delivery (■ PERG 15 Annex 3, paragraph (c)). In our view, the exclusion applies to the delivery of funds to the customer, whether in physical or electronic form. However, it does not extend to the remitting of funds to third parties on the customer's behalf.

Q34.We are a charity which collects donations in the form of coins, banknotes and electronic payments and transmits funds via bank transfer to the causes that we support do the regulations apply to us?

No. The PSRs 2017 do not apply to payment transactions consisting of non-professional cash collection and delivery as part of a not-for-profit or charitable activity (see ■ PERG 15 Annex 3, paragraph (d)).

Q34A.We are an online fundraising platform which collects donations in the form of electronic payments and transmits funds electronically to the causes and charities that have an agreement with us - do any of the exclusions apply to us?

Persons collecting cash on behalf of a charity and then transferring the cash to the charity electronically do not fall within the exclusion in ■ PERG 15 Annex 3, paragraph (d), unless they themselves are carrying this out both non-professionally and as part of a not-for-profit or charitable activity. For example, a group of volunteers that organises regular fundraising events to collect money for charities would fall within this exclusion. On the other hand, an online fundraising platform that derives an income stream from charging charities a percentage of the money raised for them (whether or not this is for profit) is unlikely to fall within this exclusion.

Nor will an online fundraising platform accepting donations and then transmitting them to the intended recipient be able to take advantage of the exclusion in paragraph (b), as they are not a commercial agent authorised via an agreement to negotiate or conclude the sale or purchase

of goods or services on behalf of either the payer or the payee but not both the payer and the payee.

Online fundraising platforms should also consider the guidance in Q33A.

Q35. We provide a "cashback" service to our customers when they pay for their goods at the checkout - do the regulations apply to us?

No. The PSRs 2017 do not apply to cashback services (see ■ PERG 15 Annex 3, paragraph (e)).

Q36. We are a bureau de change providing cash only forex services and our clients do not have accounts with us - are these services outside the scope of the regulations?

Yes. The PSRs 2017 do not apply to cash-to-cash currency exchange operations where the funds are not held on a payment account (see ■ PERG 15 Annex 3, paragraph (f)). If you allow a customer to pay for foreign currency using a payment card, this does not mean that you will be providing a payment service. The regulations will though apply to the payment transaction made using the payment card and the payment service provided to you by the merchant acquirer. In other words, the regulations apply to the merchant acquirer's services but yours remain outside the scope of authorisation or registration.

The PSRs 2017 do not affect your obligations under the *Money Laundering Regulations*.

Q37. Do the regulations distinguish between (i) payment transactions between payment service providers and (ii) payment services provided to clients?

Yes, broadly the object of the PSRs 2017 is the payment service provided to specific clients and not the dealings among payment service providers to deliver the end payment arising from that service. The PSRs 2017 do not apply to payment transactions carried out between payment service providers, their agents or branches for their own account (see PERG 15 Annex 3, paragraph (m)). This would include, for example, electronic payment from one payment services provider to another acting as such, in discharge of a debt owed by one to the other.

A payment transaction may involve a chain of payment service providers. Where a bank, for example, provides a cash withdrawal or execution of payment transaction service to its customer which involves the use of a clearing bank, it will still be providing a payment service to its customer.

The regulations do not though cover inter-bank settlement. More specifically, the regulations do not apply to payment transactions carried on within a payment or securities settlement system between payment service providers and settlement agents, central counterparties, clearing houses, central banks or other participants in the system (see ■ PERG 15 Annex 3, paragraph (h)).

Q38. We are an investment firm providing investment services to our clients - are payment transactions relating to these services caught by the regulations?

Generally, no. Where payment transactions only arise in connection with the main activity of providing investment services, in our view it is unlikely that you will be providing payment services by way of business. In those limited

cases where you are, the PSRs 2017 do not apply to securities assets servicing, including dividends, income or other distributions and redemption or sale (see ■ PERG 15 Annex 3, paragraph (i)).

Q39. We are a firm simply providing IT support in connection with payment system infrastructures - are these services subject to the regulations?

No. There is an exclusion for technical service providers which simply provide IT support for the provision of payment services (see ■ PERG 15 Annex 3, paragraph (j)). Other support services that may be provided by technical service providers include data processing, storage and authentication. This does not mean that where these services form part of a payment service they are not regulated, but in that case it is the payment service provider that is responsible under the PSRs 2017 for the provision of these services, not the person they have outsourced these technical services to.

Providers of payment initiation services or account information services are not technical service providers.

Q40. Which types of payment card could fall within the so-called "limited network" exclusion (see PERG 15, Annex 3, paragraph (k))?

The "limited network" exclusion forms part of a broader exclusion which applies to services based on specific payment instruments that can be used only in a limited way and -

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

(b) 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;

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

(d) are valid only in the United Kingdom, 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.

It is an overarching requirement for the exclusion to apply that the payment instrument can be used only in a 'limited way'. This means that even if a payment instrument could be said to fall under one of the paragraphs (a) to (d) above, it may not qualify for the exclusion if, on a reasonable view, it is not sufficiently limited. In particular, the recitals to PSD2 (which the PSRs 2017 implemented) indicate that the following should not be considered 'limited' (see recitals 13 and 14 PSD2):

payment instruments that can be used to acquire goods and services within more than one limited network;

payment instruments that can be used to acquire an unlimited range of goods and services;

specific-purpose instruments which become general-purpose;

instruments that can be used in a network of service providers which is continuously growing.

Generally, it will not be sufficient to rely on the customer terms and conditions alone to demonstrate that an instrument can only be used in a limited way. We would expect providers to take such steps as are reasonably practicable to ensure the limitation is effective, including functional restrictions where technically possible. The limitation should also be reflected in the marketing of the product.

As regards (a), examples of excluded instruments could include:

(1) staff catering cards - reloadable cards for use in the employer's canteen or restaurant;
(2) tour operator cards - issued for use only within the tour operator's holiday village or other premises (for example, to pay for meals, drinks and sports activities);

team related cards - cards that can only be used at a specific stadium or team's website;

(3) store cards - where the card can only be used at the issuer's premises or website (so where a store card is co-branded with a third party debit card or credit card issuer and can be used as a debit card or credit card outside the store, it will not benefit from this exclusion).

While store cards that can be used on a department store website to purchase items from concessions may benefit from the exclusion, payment instruments that can be used on online marketplaces are unlikely to do so. This is because the scale of the operation and the very broad range of the goods and services that can be sold or the sellers that can sell through such marketplaces mean that instruments that can be used on them are unlikely to be sufficiently limited.

In our view, 'gift cards' where the issuer is a retailer and the gift card can only be used to obtain goods or services from that retailer are not payment instruments within the meaning of the PSRs 2017. This is because these basic gift cards do not initiate payment orders; payment for the goods or services is made by the customer to the retailer of the goods in advance, when the card is purchased from the retailer. Accordingly, this exclusion is not relevant to them.

In order to meet the test in (b), recital 13 of PSD2 states that the instrument must be limited to use at a 'specific retailer or specific retail chain, where the entities involved are directly linked by a commercial agreement which for example provides for the use of a single payment brand and that payment brand is used at the points of sale and appears, where feasible, on the payment instrument that can be used'. It also states that to help limit risks to consumers, it should not be possible to use the same instrument to make payment transactions to acquire goods and services within more than one limited network.

Recital 14 of PSD2 goes on to state that 'instruments which can be used for purchases in stores of listed merchants should not be excluded from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.'

In our view, examples of excluded instruments falling within (b) include:

(1) transport cards - where these are used only for purchasing travel tickets from providers within a closed system (for example, the Oyster card which provides access to different service providers within the London public transport system);
(2) fuel cards (including pan-European cards) - where these are issued for use at a specified chain of fuel stations and forecourts at these stations;
(3) membership cards - where a card can only be used to pay for goods or services offered by a specific club or organisation;
(4) store cards - where the card can be used at a specified chain of stores sharing a common brand, whether under common ownership or under a franchise agreement;

store cards - where the card can be used at stores under common ownership, even where they do not share a common brand;
a card that can only be used to buy goods or services within a specific university campus.

We would not generally expect 'city cards' to fall within this exclusion, to the extent that participation is open to all a city's shops and businesses.

'Mall cards' may fall within this exclusion if, on the facts, the criteria are met. In our view you will not be able to take advantage of this exclusion unless: it is made clear in the relevant terms and conditions of the card that the purchaser of the value is only permitted to use the card to buy from outlets of merchants with whom you have direct commercial agreements located within a particular shopping centre; and the card is functionally restricted to one shopping centre. A card that can be used at a number of different shopping centres, or where use is restricted only by the terms and conditions that apply to the card and is not functionally restricted is unlikely to fall within this exclusion. There must be direct commercial agreements in place between the issuer and the merchants – this will not be satisfied where the merchant's agreement is with the shopping centre, a programme manager or a different entity in the issuer's group and not the issuer.

Outside these cases there may be other situations where a network is sufficiently limited. In these cases, we will consider what factors constrain the growth of the network, and whether these are sufficiently robust and independent to ensure the overarching condition is met.

We also believe that placing an arbitrary cap on the number of firms that can be within a network, without any reference to the specific characteristics of the case, is not an appropriate approach. Similarly, we believe that a cap on membership numbers volunteered by an issuer without reference to any independent limitation will not be an appropriate approach.

Examples of where the network is not sufficiently limited include: trade associations that have membership criteria which are open and which could not therefore exclude continuous growth; and mobile app-based payment instruments which have an unlimited number of providers of goods and services.

In relation to (c), recital 13 states that it should only be possible to purchase a 'very limited range of goods or services, such as where the scope of use is effectively limited to a closed number of functionally connected goods or services regardless of the geographical location of the point of sale'.

Examples of instruments falling within (c) could be:

fuel cards - where these can only be used to purchase fuel and a closed number of goods or services that are functionally connected to fuel (such as engine oil and brake fluid), including where the cards can be used at multiple retail chains;

transport cards – where these are used only for purchasing travel tickets;

payment instruments that can be used only to purchase taxi journeys;

payment instruments that can be used only to purchase live entertainment tickets and services directly tied to live entertainment events;

payment instruments that can be used only to purchase digital content within an online game to pay developers of these games.

In our view, instruments falling within (d) could include:

pre-paid cards provided by local authorities to benefit recipients for use at a specified chain of grocery stores;

government-issued childcare vouchers.

Instruments for the purpose of this exclusion can include vouchers, mobile applications, cards and other devices.

Service providers relying on paragraphs (a) to (c) of this exclusion are required to notify the FCA where the total value of payment transactions executed through such services exceeds 1 million euros in any 12 month period as directed: see https://www.fca.org.uk/firms/limited-network-exclusion.

Q41. [deleted]

Q41A.In what circumstances are payments made via a mobile phone excluded?

The 'electronic communications exclusion' (see PERG 15 Annex 2 paragraph (l)) applies to payment transactions resulting from services provided by a provider of electronic communications networks or services.

For this exclusion to apply the service must be provided in addition to electronic communications services for a subscriber to the network or service and the payment must be charged to the related bill.

Where the provider of the network or service allows the customer to pay for eligible transactions out of a prepaid balance that is also used to purchase the electronic communications services, in our view this will amount to the payment transaction being charged to the related bill.

The exclusion only applies:

to the purchase of digital content and voice-based services (such as music and other digital downloads and premium rate services), regardless of the device used for the purchase or consumption of the digital content; or

when performed from or via an electronic device for donations to charity (for example SMS donations) or for the purchase of tickets.

In all cases the value of any single payment transaction must not exceed £40, and the cumulative value of payment transactions for an individual subscriber in a month must not exceed £240.

The exclusion does not only apply to purchases made via mobile phones. It could, for example, apply to the purchase of music streaming, news content or other digital services through a smart TV or set-top box if provided in addition to electronic communications services and charged to the related bill.

The exclusion does not apply to the purchase of physical goods.

An electronic communications network or service provider providing services falling within the electronic communications exclusion must notify the FCA and provide it with an annual audit opinion that the transactions to which the services relate comply with the financial limits - as directed. See: https://www.fca.org.uk/firms/electronic-communications-exclusion. For the purpose of application of the financial limits, the FCA will expect notification on the basis of individual telephone numbers or SIM cards being treated as separate 'subscribers', rather than account holders.

Where a provider of a network or service sells subscribers additional goods or services itself (i.e. where it is acting as principal) this exclusion will not be relevant, as no payment service is being provided by the provider of the network or service even if the payment is charged to the related bill.

Q41B.I act as an intermediary between suppliers of digital goods and services and network operators. Does the electronic communications exclusion apply to me?

In practice, electronic network operators often do not deal directly with suppliers of digital goods and services, but via carrier billing platforms that act as intermediaries or aggregators.

The PSRs 2017 make clear that where a network operator benefits from the exclusion with respect to a particular transaction, the provider of any other payment service resulting from that transaction will also benefit from the exclusion (this is known as the "cascade").

The service provided by the billing platform to merchants will amount to a payment service (for example, merchant acquiring or operation of a payment account) only where it results from transactions that do not fall within this exclusion.

All firms which form part of the cascade with respect to a particular transaction can benefit from the ECE for that transaction. However, if the firm at the start of the cascade does not comply with the conditions for the ECE, this will affect the other firms within the chain of providers. Since they cannot benefit from the cascade if the original transaction is not within the ECE, they will need to consider what action they need to take to avoid breaching the regulations, such as becoming authorised.

This may be a particular issue for phone-paid services where both 'originating operators' and terminating operators potentially provide payment services to their customers. Typically, the originating operator is the telecoms provider of the purchaser of the digital goods or services and the 'terminating operator' is typically the telecoms provider to the supplier of digital goods and services. A terminating operator's carrier billing platform may for example involve the provision of merchant acquiring services to and/or operation of a payment account for a supplier.

Originating operators can directly ensure financial thresholds in the ECE conditions are not breached with respect to a particular transaction. For

example, they can cap the cost of a call and put in place monthly spend caps. This will not be possible for terminating operators. As a result, they will need to consider how they can ensure that the ECE limits have not been exceeded if they wish to rely on the exclusion.

Q42. [deleted]

Q43. We are a company which performs a group treasury function, including providing payment services directly to other group companies - are these intra-group payment services excluded from the regulations?

Yes. Intra-group payment transactions and related services are excluded from the PSRs 2017, where payment is made direct from one group company to another (see ■ PERG 15 Annex 3, paragraph (n)). This includes the case where the group company providing the payment service is, itself, a payment service provider otherwise subject to the regulations. However, it does not include intra-group payment transactions that are made through a payment service provider that does not belong to the group.

In our view, this exclusion is likely to extend to payment initiation services and account information services where these are provided by one group company to another member of the same group as part of a group treasury function.

Q44.We are an independent ATM deployer offering cash dispensing facilities to users on behalf of card issuers. We are not a bank. Are we subject to the regulations?

No, assuming you do not provide other payment services listed in Schedule 1 Part 1 to the PSRs 2017 and are not party to the framework contract with the customer withdrawing money (see ■ PERG 15 Annex 3, paragraph (o)). However, you must still provide the customer with the information referred to in regulation 61 of the PSRs on withdrawal charges. If other payment services are provided, all your payment services (including the ATM cash dispensing facilities) will be subject to the regulations, to the extent that other exclusions are inapplicable.