EXPLANATORY MEMORANDUM TO

THE PAYMENT SERVICES (AMENDMENT) REGULATIONS 2024

2024 No. 1013

1. Introduction

1.1 This explanatory memorandum has been prepared by His Majesty's Treasury and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Tulip Siddiq, Economic Secretary to the Treasury at His Majesty's Treasury confirms that this Explanatory Memorandum meets the required standard.

2.2 Anna Harvey, Deputy Director for Payments and Fintech, at His Majesty's Treasury confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Jamie Slater at His Majesty's Treasury email: Jamie.Slater@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 In most cases, when a payer orders its payment service provider, such as a bank, to execute a payment order, the Payment Services Regulations 2017 [1] require the payee's account to be credited by the end of the business day following receipt of the payment order (D+1). This instrument allows a payment service provider to delay the crediting of the payee's payment service provider's account for certain in-scope payments [2] by up to a further 72 hours (D+4). This is permissible only when the payer's payment service provider has established that there are reasonable grounds to suspect that the payment order has been placed subsequent to fraud or dishonesty perpetrated by someone other than the payer. Such grounds must have been established by the end of D+1, and where more time is needed for the payment service provider to contact the payer or a relevant third party to make further enquiries in order to establish whether it should execute the payment order.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction which the instrument forms part of the law of) is the United Kingdom.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

[1] https://www.legislation.gov.uk/uksi/2017/752/contents/made

[2] An "in-scope payment" means an outbound authorised push payment wholly executed in the UK in sterling.

5. Policy Context

What is being done and why?

5.1 According to the Crime Survey for England and Wales, fraud accounts for approximately 36% of all crime and was the most common crime type in the year ending March 2024.[3] Across 2023, fraud cost victims over £1.1bn according to UK Finance. In particular, data from UK Finance also shows that there were over 230,000 instances of authorised push payment scams in 2023, where an unsuspecting victim was manipulated into authorising a payment to a fraudster, with losses totalling £459.7m. This same data from UK Finance also highlights that 98% of this fraud takes place over the Faster Payments System, the UK's real-time payments system that allows for near-instant transfer of funds.[4]

5.2 There are significant benefits today for consumers and businesses in the speed, ease, and certainty of making payments quickly over the internet or using a mobile phone. However, the speed of these transactions combined with the sophistication of fraudsters has led to a significant increase in fraud, creating untold distress for victims, who may suffer lifechanging financial losses, as well as wider social harms. This is particularly the case for complex and sophisticated frauds, such as investment or romance scams, where victims are often socially engineered and coerced into unwittingly sending money to fraudsters.

5.3 Therefore, this instrument introduces the ability for payment service providers to slow down the sending of an in-scope payment where the payer's payment service provider has established that there are reasonable grounds to suspect the payment order has been placed subject to fraud or dishonesty by someone other than the payer. This is permitted where the grounds have been established by the end of D+1, and where more time is needed for the payment service provider to conduct further enquires with the customer or a relevant third party. The delay to the payment must be no longer than necessary and, in any event, no longer than the end of D+4. This gives a payment service provider more time to intercept potentially fraudulent payments, interrogate them and "break the spell" of the fraudster, in individual cases. The conditionality for using this measure means it cannot be applied as a tool to 'derisk' whole categories of transactions where those grounds are not established.

5.4 To ensure payment service providers are transparent when a payment is delayed, they are required to inform the payment service user of the fact of the delay, the reason for it and what information or actions are needed to help the payment service provider decide whether to execute or refuse the payment order (unless providing any of that information would be unlawful). This information must be provided as soon as possible and no later than the end of D+1.

5.5 This instrument applies only to outbound authorised push payments wholly executed in the UK in sterling (referred to as "in-scope payments"). It does not apply to pull payments (i.e., those initiated by the payee such as card payments), payments as part of the Single Euro Payments Area, international payments or paper-initiated transactions.

[3] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2024#:~:text=Latest%20estimates%20from%20the%20Crime,ending%20(YE)%20March%202024.

[4] https://www.ukfinance.org.uk/system/files/2024-05/Annual%20Fraud%20Report%202024_0.pdf

5.6 In recognition that a payment service user may incur interest or charges as a result of a payment service provider's decision to delay a payment order, the payment service provider will be liable for any such costs, regardless of whether the payment order was ultimately executed. This ensures a customer does not unfairly lose out as a result of a delay, whilst also incentivising the payment service provider to use this provision carefully.

5.7 A number of firms have questioned whether the liability for interest and charges would apply to wider costs that may arise, such as financial gains from an investment, where the customer's payment was delayed ('loss of chance). The Government notes that the provision in this instrument is restricted to interest and charges only, incurred as a consequence of a delay to the execution of a payment order under the terms of this instrument. It does not extend more widely to loss of chance. A similar provision already exists under Regulation 94 of the Payment Services Regulations 2017, with regard to the non-execution, defective or late execution of a payment transaction.

What was the previous policy; how is this different?

5.8 Currently, the Payment Services Regulations 2017 require that for most payments, once a payment order is received, the amount of the payment transaction is credited to the payee's payment service provider's account or refused by the end of the business day following the time of receipt of the payment order (D+1). Whilst this ensures that payments are processed in an efficient and prompt manner, it provides insufficient time for payment service providers to intercept complex fraud cases and "break the spell" of the fraudster. This instrument resolves this by giving payment service providers more time to investigate in-scope payments where there are reasonable grounds to suspect fraud or dishonesty and more time is needed for the payment service provider to complete enquiries with the payer and/or relevant third parties.

6. Legislative and Legal Context

How has the law changed?

6.1 When the UK left the European Union (EU), the body of EU legislation that applied directly in the UK at the point of exit was transferred onto the UK statute book by the European Union (Withdrawal) Act 2018[5]. This is known as "assimilated law".

6.2 The Payment Services Regulations 2017 is assimilated law which broadly governs the authorisation and associated requirements for authorised or registered payment service providers. This includes the rights of payment service users and obligations of payment service providers in relation to the provision of payment services.

6.3 The Financial Services and Markets Act 2023 ("FSMA 2023") contains a number of new legislative powers, which work together as a set of tools for managing assimilated law[6]. These include a power to modify legislation, providing HM Treasury with a power to make targeted modifications to assimilated law.

6.4 This instrument is made using powers in sections 3(1) and 84(2) FSMA 2023 and makes transitional amendments to Payment Services Regulations 2017 for the purpose set out in section 3(2)(f) of FSMA 2023 of protecting consumers.[7]

[5] European Union (Withdrawal) Act 2018 c.16.
[6] Financial Services and Markets Act 2023 c.29.
[7] Section 3, Financial Services and Markets Act 2023

6.5 Regulation 86(1) of the Payment Services Regulations 2017 provide that a payer's payment service provider must ensure that the amount of the payment transaction is credited to the payee's payment service provider's account by the end of the business day following the time of receipt of the payment order (D+1). Different timescales apply to certain kinds of transactions, for example, those initiated by way of a paper payment order.

6.6 This instrument therefore amends regulation 86 of the Payment Services Regulations 2017 to allow payment service providers to delay the crediting of the payee's account with an in-scope payment up to a further 72 hours (D+4) where the criteria in the instrument are met.

6.7 Finally, this instrument inserts a new regulation 94A into the Payment Services Regulations 2017 to make it clear that, when a payment service provider's decision to execute a payment order results in interest or charges being incurred by the payment service user (payer), the payment service provider will be liable for these costs, whether or not the provider ultimately decided to execute the payment order.

6.8 The new provisions inserted by the instrument into Payment Services Regulations 2017 are subject to the corporate opt-out in regulation 63(5)(a), meaning that where a payment service user is not a consumer, a micro-enterprise or a charity, the user and their payment service provider may agree that any or all of the provisions do not apply.

Why was this approach taken to change the law?

6.9 Currently, the execution times for payment orders are legal requirements set out in regulation 86 of the Payment Services Regulations 2017. Therefore, the only way to achieve the policy objective was to amend regulation 86 of Payment Services Regulations 2017 and related provisions to create an appropriate ability for payment service providers to delay an in-scope payment and set conditions around this. The approach taken means that the provisions relating to payment transactions are contained in the same regulation – regulation 86. A new provision – regulation 94A – has been inserted into the Payment Services Regulations 2017 to set out the liability of a payment service provider for charges and interests as a consequence of a delay to a payment order under regulation 86(2B).

7. Consultation

Summary of consultation outcome and methodology

7.1 In January 2023, a Call for Evidence regarding the Payment Services Regulations 2017 was launched [8]. This sought views on whether payment service providers should have more time to interrogate suspicious payments. The majority of respondents supported the principle of amending the execution time for payments, where this related to potentially fraudulent payments.

7.2 Subsequent and prior to this consultation, there has been significant engagement with a range of stakeholders including the financial services sector and consumer organisations to design this legislation and ensure that it provides an effective tool to tackle authorised push payment fraud whilst minimising the impact on legitimate payment flows.

[8] https://www.gov.uk/government/calls-for-evidence/payment-services-regulations-review-and-call-for-evidence

7.3 This engagement culminated in the publication of a draft version of this statutory instrument in March 2024 on gov.uk [9], where technical comments were invited. Fourteen responses were received. Further bilateral engagement with individual firms and trade bodies was undertaken to support this feedback.

8. Applicable Guidance

8.1 The Financial Conduct Authority launched a consultation on guidance to support the implementation of this instrument on 9 September 2024 [10]. This consultation concluded on 4 October. The Government expects that the final guidance will be made publicly available shortly after the instrument comes into force.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

Impact on businesses, charities and voluntary bodies

9.2 This legislation is predominantly expected to have an impact on payment service providers but will also impact businesses that make payments. Across all relevant parties, the government expects that this legislation will provide a net benefit of £38.5 - £231m, with a best estimate of £115.5m, across a ten-year appraisal period. For payment service providers specifically, the government expects that this legislation will provide a net benefit of £32.2 - £193.1m, with a best estimate of £96.6m

9.3 Specifically, this legislation is expected to reduce instances of APP fraud, reducing the level of losses that payment service providers will need to reimburse under the Payment Systems Regulator's new mandatory reimbursement regime. Businesses which make payments will also benefit through keeping losses that would otherwise have not been reimbursed. There may be one-off transitional and ongoing costs to payment service providers from using this legislation. However, this legislation is permissive, meaning that the Government expects that payment service providers will only use this legislation when it delivers a net benefit to them and are under no obligation to do so.

9.4 The legislation affects small or micro businesses. Specifically, it will impact small and micro businesses that are payment service providers but also small and micro businesses that are payment service users. In both cases, the Government does not believe it would be proportionate or desirable to exempt small or microbusinesses from this legislation.

9.5 With regard to small and micro businesses that are payment service providers, this legislation is permissive, meaning that it does not impose any new burdens on these businesses. The Government expects that this legislation will only be used by these firms when there is a net benefit for them doing so.

9.6 With regard to small and micro businesses that are payment service users, the Government expects any impact to be limited. The instrument contains a number of

[9] https://www.gov.uk/government/publications/the-payment-services-amendment-regulations-2024-policy-note
[10] https://www.fca.org.uk/publications/guidance-consultations/gc24-5-app-fraud-enabling-risk-based-approach-payment-processing

requirements to ensure that the ability to delay a payment is carefully calibrated and is only applied in relevant cases. Practically, this means the Government expects this instrument to apply to only a very small percentage of in-scope payments and that the vast majority impacted will not involve businesses, as data from 2022 showed that only 2.9% of relevant APP scams involved a business as a victim of fraud.

9.7 In addition, small businesses are able to make use of the "corporate opt out" provision in regulation 63(5)(a) of the Payment Services Regulations 2017. This would allow these business customers to disapply the changes being introduced in this legislation – with the agreement of their payment service provider.

9.8 The "corporate opt out" is not available to micro businesses, noting that they are likely to lack the negotiating capital to agree terms with their payment service provider. However, the Government considers that it would be discriminatory to exempt payments involving micro businesses from this legislation, noting that businesses can also become victims of authorised push payment fraud. Taken together, therefore, the Government considers that the cost impact on small and microbusinesses as payment service users is likely to be manageable, or even negligible, especially considering the potential benefits of protecting a small or microbusiness from falling victim to fraud.

9.9 There is no, or no significant, impact on the public sector. There may be a cost impact for the FCA, which will be the authority responsible for supervision of compliance with the legislation. Due to the legislation being permissive and not creating any new regulatory requirements, the FCA expects any costs to be negligible.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The Government has liaised with the FCA as the responsible regulator for payment services to understand how it plans to monitor the use of this regime. The FCA plans to collect data from industry on a voluntary, ad-hoc basis through existing supervisory engagement processes. In the first instance, it expects that this data will involve information on volumes and values of delayed inbound and outbound payments, the length of delays, the outcomes and the value of authorised push payment fraud prevented.

10.2 Once the FCA has assessed the types and utility of information available (via the ad-hoc collection of data), it will consider proposals for the scope and content of a permanent monitoring and evaluation regime.

10.3 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Tulip Siddiq, the Economic Secretary to the Treasury has made the following statement:

"It would be disproportionate to include a statutory review clause in this legislation as it does not introduce new burdens on businesses and the FCA is taking forward an ongoing monitoring regime through its supervisory processes. Furthermore, this instrument implements amendments to the Payment Services Regulations 2017. The Financial Services and Markets Act 2023 repeals assimilated law relating to financial services, subject to commencement by HM Treasury. It can then be replaced with an approach to regulation tailored to the UK. The Payment Services Regulations 2017 are assimilated law, and will be considered and reviewed as part of this process".

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Economic Secretary to the Treasury Tulip Siddiq has made the following statement regarding Human Rights:

"In my view the provisions of The Payment Services (Amendment) Regulations 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts"). It does however relate to the United Kingdom's withdrawal from the European Union because the instrument modifies certain assimilated law using the powers under the Financial Services and Markets Act 2023.